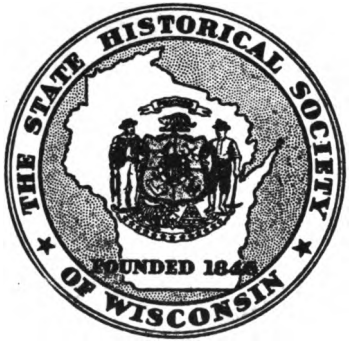

THE
MINIMUM WAGE

WITH PARTICULAR REFERENCE TO THE LEGISLATIVE MINIMUM WAGE UNDER THE MINNESOTA STATUTE OF 1913

By ROME G. BROWN,
Minneapolis, Minn.

[2nd Print]

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THE MINIMUM WAGE

With particular reference to the Legislative Minimum Wage under the Minnesota Statute of 1913.

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Minneapolis, Minn.

SCOPE OF THIS DISCUSSION.

The enactment of a minimum wage statute in Minnesota makes necessary a present and local discussion of the minimum wage question. Such legislation necessarily affects the interest of all employers and of all employes, which two classes comprise substantially the entire citizenship. Before its attempted application as a legislative measure in this state, local interest in the question was naturally confined to those who happened to interest themselves in its study as a doctrine discussed by students of ethics, economics and history. As is true in the case of most reform measures, its advocates have been most active, and, for the reason that it has been put forward as a social welfare measure, most persuasive. Whether it be, in fact, expedient, from either an economic or legal viewpoint, it is safe to say that its enactment in Minnesota, particularly in the form of the Act of 1913, was not due to any well-considered or deliberate judgment of the legislature nor of any considerable number of its members, and furthermore that it was not demanded by any stress of public opinion founded on prevalent conviction resulting from any general, deliberate consideration or study of the merits or demerits of a legislative minimum wage. The general mass of citizens of the state first knew of the enactment,—and even learned for the first time that there was a minimum wage doctrine, or at least a doctrine of a legislative minimum wage,—when, after the 1913 session, they discovered the present statute among those which had been passed by the legislature.

The Minimum Wage Commission authorized by that statute has been organized, and it is proposing to establish a minimum wage as to certain occupations, preparatory to enforcing the compulsory features of the statute. The Commission has established an Advisory Board to inquire into and to recommend a minimum wage for the mercantile occupations in the cities of Minneapolis and St. Paul. The first questions with which such Advisory Board was confronted were as to the practical workability of the statute, the power and authority of such Advisory Board and of the Commission, under the complex and seemingly contradictory statutory provisions, to fix a minimum wage for particular occupations, or for particular localities, or for particular classes of persons, evidently intended to be covered by the statute; also, the basis of computing such minimum wage under varying circumstances or for different classes of employes; also the enforcibility of the act. These and other questions must be answered before proceedings could begin; and the questions propounded to the legal department of the State by that Advisory Board evidenced the difficulties which were encountered at the very outset.[1]

It may be said that these questions precipitate local discussion of the minimum wage in this state. The immediate question is the practicability of the present Minnesota statute. A discussion of this question, however, leads to a broader field of discussion; because the practicability of a particular minimum wage statute cannot be well understood without some general understanding of the subject of the minimum wage in its general phases. Such general information should be had by both classes of citizens affected, by both employers and employes. It should be had, too, by the public as a whole, at least in its general aspects. The more technical phases of the question, the economic and the legal phases, should be carefully considered by those upon whom the duty devolves to enforce, so far as enforcible, the law stated in the terms of the statute.

The primary object of this discussion, then, is to present the question of the legislative minimum wage as proposed by the present Minnesota statute. But in order to approach that question intelligently, it is necessary to discuss briefly the gen-

1 See Appendix II.

eral question of the minimum wage, and more particularly that of the legislative minimum wage.

It is not within the scope of this discussion to detail or examine the various theories of writers upon economics who generally stand as authority against the doctrine of a minimum wage. Their studies involve discussions of the old and to some extent repudiated doctrine of the wage-fund, the doctrine of the paramount law of supply and demand and that theoretical antagonism to any interference by paternal legislation with the economic laws of trade, including the relations between employer and employe, denoted by the well-known economic doctrine of *laissez faire*. It is sufficient for the present purposes to say, that it is generally recognized that the obstructive influence of these economic doctrines to practical interference by the State in the interests of social welfare, is growing less and less. Actual experience has shown that, within certain defined limits, legislative protection, theoretically inconsistent with certain supposedly established economic theories, to certain classes of citizens who, by reason of their situation in life, are less able to protect themselves, is not only feasible, but has been followed by salutary results. The dogmas, therefore, of the economic doctrinaires are not necessarily controlling for the mere reason that the practical application of legislative protection presents conflicts with this or that theory of economic law.

It must be admitted that there is a breaking down of the full force and effect once theoretically ascribed to certain stereotyped doctrines of the economists. This fact must be recognized in any helpful discussion of the subject. Practical enlightenment can best come from the comparatively modern studies which have been presented as to the practicability of the minimum wage as a subject of legislative compulsory enactment. These modern studies of the subject have been sometimes by those who view the questions involved as purely ethical, and who assume that beneficial results will be accomplished only through voluntary co-operation induced by a higher regard for moral duty and a better appreciation of ultimate benefits, effective only through sacrifice of selfish interest in behalf of the welfare of others.

Another viewpoint of discussion is that of the purely scientific student who assumes the establishment of a minimum wage, either by voluntary co-operation or by legislative compulsion, and who, in advance of its establishment, presents the possible advantages or disadvantages of its application to either the employer or employe, or both. Such student views the question as one more purely of economic law.

Then there is a third phase of the discussion which involves not only questions of ethics and of economic law,—that is, both the moral and the scientific viewpoints,—but also questions of constitutional law. The questions involved in this third phase of the discussion are at present the most pressing; but they cannot be intelligently presented nor understood without some consideration of the ethical viewpoint and particularly of the economic questions necessarily involved. Some consideration also is necessary to be given to the history of the agitation for the minimum wage.

Therefore, before taking up the legislative minimum wage, I will call attention briefly to a consideration of the subject of the minimum wage, first from the ethical and next from the economic viewpoints.

The Minimum Wage as an Ethical Measure.

It is unnecessary to discuss the advocacy of the minimum wage made by that class of social and political antagonists to restraint from either constitutional or economic law who represent modern socialist doctrines. The socialist demands as a matter of fundamental human right the equal division among all citizens of the state of an ownership or direct property interest, not only of all private and public property within the jurisdiction of the State, but also of all profits, revenue and proceeds therefrom. Both the theory and practice of wages as such are repudiated as a part of a prevailing fundamental system of injustice. An orthodox socialist could not, therefore, be a consistent advocate of the minimum wage. The socialist spirit of compulsory division, of disregard for economic law, and of defiance of constitutional restraint, has, however, pervaded the advocacy of the minimum wage, in so far as it bases the absolute right to a minimum wage,—computed by the full

measure of the necessities of living in comfort and in health, —upon the mere fact of the existence of the wage earner, regardless of his efficiency, regardless of his wage-earning ability, regardless of the benefits of his labor to his employer, and regardless of every other consideration. Such advocacy of the minimum wage is but one phase of a socialistic attitude, demanding concessions and even division of property and income, on the theory that the fact alone of possessing life entitles its possessor to share in all other possessions or advantages held by other living beings. In justice to Father Ryan, it should be borne in mind that while he is an extreme advocate of the minimum wage, particularly upon ethical and religious grounds, he is an active antagonist of the socialist system.[2]

In the purely ethical phases of the question there is little field for contention; because this, as any question of ethics, involving the abstract question of duty, of right and wrong, of charity, of benevolence, of sacrifice for others, becomes from its ethical viewpoint more like a question of religion. It must be solved in fact by each individual or each community of individuals according to the dictates of conscience. The means for accomplishing beneficial results are enlightenment and moral suasion, inducing so far as possible voluntary co-operation and thereby bringing promised benefits in proportion to the extent of the co-operation secured. Such ethical advocacy of the minimum wage is based on an assumed right of every person to have and receive that certain amount of material goods which is sufficient to afford him a decent livelihood; that this right is a moral right, based on his intrinsic worth as a person; and that it is a right as valid, even if of less importance, as his right to life. It is said that the laborer's right to a living wage is but the specific form of his generic right so belonging to every person.[3]

With such advocates the question involved is one between the method of unrestricted bargaining as to wages and a "professedly ethical standard."[4] Economic law is an abstract bogey

2 See Debate on Socialism between Morris Hillquit (affirmative) and John A. Ryan (negative) in October, 1913, and following numbers of Everybody's Magazine.
3 "A Living Wage, Its Ethical and Economic Aspects," by John A. Ryan, published by McMillan Co., New York and London, 1912, Chap. XIX, page 324.
4 "A Living Wage," page 22.

with which the question has no real relation, because moral forces may overcome the forces of economic law, and in any event the moral right of the laborer is paramount to the economic rights of the employer, whose moral duty to his employe is gauged by the asserted moral right of the latter. "As a determinant of rights, economic force has no more validity or sacredness than physical force." The employer's right to any return on his investment is subordinate to the laborer's right to receive from him a living wage.[5] The living wage doctrine, then, to this class of advocates, is an ethical question and even a question of purely religious ethics; and the remedy to be thereby accomplished is to be brought about through moral suasion addressed to individuals, furthered by organized effort. "There must be an appeal to the minds and hearts of individuals and the fullest utilization of the latent power of organization and social institutions."[6]

The ethical advocate, also, recognizes no practical obstacle to the establishment of a minimum wage arising from the forces of economic law. He casts aside such opposing forces as nonexistent because in practice they will be found to be actual only in the minds of the abstract economists; or, if it transpires that they are real, then any disastrous economic result should be submitted to because of the paramount nature of the moral or ethical law establishing the right to the minimum wage. Voluntary recognition of this right and co-operation in the establishing of the minimum wage should be brought about by persuasion and by organization. Compulsory submission can be only brought about indirectly by influence and example. In short, to the ethical advocate, the minimum wage can be established only to the extent that voluntary cooperation may be induced. A preliminary requisite to any legislative minimum wage would be necessary changes in the federal constitution and in the constitutions of the several states, and these necessary changes would be very difficult to obtain.[7]

The foregoing summary of the advocacy of the establishment of a minimum wage through the general recognition of a moral

5 "A Living Wage," pages 10, 326, 261.
6 "A Living Wage," page 34, page 331.
7 "A Living Wage," page 313. Also "The Minimum Wage as a Legislative Proposal in the United States," by Prof. Lindsay, page 52, in Annals of American Academy and Political and Social Science, July, 1913.

or religious right or duty is of more than incidental interest. Its urgency of co-operation as a means of accomplishing the benefits to low-paid labor suggests a practical means of obtaining beneficial results through the minimum wage. It is evident, as I shall show further on, that, wherever conditions have been improved by the establishment of a minimum wage, even in connection with legislative enactments, the compulsory features of such enactments have not been so much directly ameliorative of the status of the laborers as they have been a moral and practical assistance in encouraging organized co-operation. It was for that reason that the first minimum wage statute adopted by any of the United States was not made compulsory upon any employer. The Massachusetts act of 1912 makes the State Wage Commission simply a board to investigate and recommend a minimum wage as to any occupation; and while, even then, the statute provides for notice and hearing to the employers to be affected, and for review by the courts of any recommendation made by the Commission, it provides no penalty. It empowers the Commission to report and to publish its recommendations with the names of the employers who do not submit to the recommendation made. By such statute the State becomes an additional means of promoting co-operation, not only among employers, but between employers and employes in raising the wage of the lower classes of labor to a living wage. It adds to the efforts for amelioration by purely individual initiative and by privately organized co-operation, the encouragement and assistance of investigations and recommendations made under official authority. It naturally results in bringing in line with the employers of more humanitarian tendencies those who, from avarice, neglect or indifference, would remain inactive without some such stimulating incentive.[8] The Massachusetts example was followed by Nebraska in the enactment of the minimum wage statute of 1913 in that state.[9]

The minimum wage by voluntary co-operation, including that of the State through non-compulsory statutes, is altogether, as it must be admitted, a logical, workable measure. Whether we agree that it is properly based upon the natural and par-

8 Massachusetts Minimum Wage Statute of 1912, as amended in 1913. See Appendix III.

9 See Appendix III.

amount right of a laborer to receive, and the controlling duty of the employer to provide, in all instances a living wage, is unimportant. Its object is beneficent; it is humanitarian, and as such its accomplishment must be recognized as desirable, so far as any concrete beneficial results are not necessarily attained at the expense of other resulting disadvantages of greater importance.

The preservation of the voluntary element, however, is the means through which are obviated many of the obstacles to the practical working of a compulsory minimum wage. Under the system of voluntary co-operation, employers cannot be driven out of business; neither will the prices of their products be increased so as to deprive the recipient of a minimum wage of its benefits; neither will the minimum wage tend so much to become the maximum wage. Under a system of co-operation, the necessary adjustments, more in accordance with the natural economic law, will be worked out, and thereby artificial and unfair discrimination between competitors in the same industry will tend to be obviated.

The argument for the voluntary co-operative establishment of a minimum wage, whether as an ethical or a humanitarian measure, is far from answering the objections based upon economic and constitutional grounds to the expediency or practicability of a legislative minimum wage.

The Minimum Wage as an Economic Measure.

There are certain rules of economics which, when formally expressed, are merely the statement of certain natural laws of industrial science and of the science of trade and commerce. Such economic laws are controlling in the same way, even if not to the same extent, as natural laws of physics are controlling in respect of the phenomena of nature to which they are applicable. Disregard or violation of such natural law, whether it be economic or physical, tend in all instances to cause, and in many instances inevitably cause, disturbance and even disaster.

Sometimes the disturbance is merely local or temporary, and its effects may be overcome or remedied by either natural or

artificial adjustments. When, therefore, a course of action is proposed which from its very nature is in conflict with natural economic laws, it is wise to proceed with caution, lest the resulting disturbance bring injurious effects greater than the proposed or possible benefits. The solution of any such question cannot be based solely upon the desires, necessities or the resulting benefits to any particular individual, nor, indeed, to any particular class of individuals. There is no system of governmental or industrial organization or policy which can be so perfectly organized and administered that, with all their varying talents, degrees of efficiency or of frailty, can act with equal benefit to all persons; or which even can fail to leave some individuals or some class of individuals not only without benefits, but with comparative disadvantage resulting from the system itself. The rule of measure of merit is "the greatest good to the greatest number." This is a rule not only of ethics and of economic law, but also of the law of governmental and legislative policy.

Any artificial interference with the wages to be paid to labor *in private employment* is an interference with the natural economic law of supply and demand. It is also an interference with the natural economic law of industrial competition. This is true as to the compulsory establishment of a wage for labor, whether the fixed wage be a minimum or a maximum. A compulsory minimum wage, whether computed upon the basis of a sum adequate to provide a decent livelihood with reasonable comforts, or upon any other basis, has inevitably the tendency, to say the least, and, it must be admitted, in some cases it has the necessary effect, to disturb the natural conditions governed by the law of supply and demand, by the law of competition and by other economic laws.

From this fact there have been urged with greater or less reason, and by some as insuperable, certain economic objections to a compulsory minimum wage, as presenting obstacles to its successful application in the modern industrial world. Examination of some of these objections will throw light upon the subsequent discussion with reference to the legislative minimum wage as applied in this country.

Economic Objections Stated.

1. The first objection is, that it necessarily creates an artificial discrimination in any occupation or industry to the disadvantage of those employers subject to the fixed wage, and in favor of others who are competitors. A federal minimum wage statute would be impossible without changing our system of government and by amendment of the Federal Constitution. Such an amendment would forever do away with the well-established principle that there should be and has been reserved to the several States all the powers of self-government and of legislation touching internal affairs and business and the relations between their citizens which are not properly powers of federal control and as such expressly imposed upon the federal government. So far, then, as concerns a minimum wage, the United States comprises forty-eight separate, competing sovereign countries with widely varying conditions of employment and wage standards.

The market for products of state industries, however, is not only nation-wide, but world-wide. In many industries the margin of profit is so small that with the slightest disturbance of their extra-state market, the industry could not survive. If wages which are now fixed by competition and by the law of supply and demand were artificially raised in one locality, the competitors in other localities would control the price of commodities and shut out of business those whose wage-rate was artificially kept above the rate made by their competitors.

For the same reason similar results within a state would follow upon the enforcement of a minimum wage fixed for one city or locality, or for one class of cities or localities, as against a different wage for other localities. An artificial discrimination would be created as to any particular occupation or industry against the localities with higher wage and in favor of those with a lower one. Nevertheless, the minimum wage statute generally contemplates just this sort of discrimination between different localities in the same state. The fact that the cost of living is different in different localities is not a justification for a lack of uniformity in the minimum wage. The employer

in the industries located in the larger urban localities, while at a disadvantage with the higher minimum wage based upon the greater local cost of living, has the advantage of better transportation and market facilities; whereas, the employer in the country, with a less minimum wage than where the cost of living is more, has the disadvantage of his less central location, poorer transportation facilities and less advantageous market. The actual cost of production does not vary with the cost of living of the employe.

A state compulsory minimum wage, therefore, based upon the cost of living necessarily results in artificial and unfair discrimination. And this is true, even if fixed wages were established for the same industry or occupation throughout the state. But the result is even more disastrous when it is proposed, as under the present statute, to establish a minimum wage as to a certain occupation in one locality without at the same time interfering in any way with the wage in the same occupation in another locality.

The discrimination resulting is all the more obnoxious to those industries in states where the margin of profit has already been cut by the establishment in practice of a higher wage rate than similar industries pay in other states. For instance, Massachusetts is near the head of the list of states in high wages. A still further raise of wages there, by compulsion, would create against the industries of that state a discrimination more serious than it would be in a state having already low wages. It would be a penalty upon that locality whose citizens by co-operation had raised the standard of its employes. The same effect would be produced upon the industries, and particularly the mercantile houses, of St. Paul and Minneapolis. While in some instances the wages are below what they might be, the mercantile houses of the Twin Cities are marketing their goods at a higher per cent of wage cost than any other city of their size in the United States. Through their mail order departments they are direct competitors in the same industries with the merchants of other large cities who pay less wages.

Discrimination, which is unfair and which would tend to become destructive of industry, is, therefore, a valid economic

objection to a compulsory minimum wage.

2. The compulsory minimum wage would also necessarily tend to, and in many instances would, drive employers out of business, by destroying profits or by turning profits into losses. This would be the result of the artificial discrimination between different localities, already noted. It would also be the natural result even where there was no local discrimination. From varying conditions affecting different industries, the margin of profit varies greatly. Many employers are already so near the restrictive limit of profit that they could not continue if additional expense were added by increasing wages by compulsion. We may view such destruction of business as economically wrong, and we may view it as resulting in the taking of property for the benefit of the employe class without due process of law. The force of both these views is recognized by the advocates of the minimum wage who base the right of the employe to have from his employer at least a certain wage upon the generic right of the employe to receive, and the corresponding duty of the employer to furnish, at least a minimum living wage, and makes that right of the employe paramount to any right of the employer. But, they argue, if the result is to "drive any employer or any industry out of existence, the tendency should be welcomed." The employer, individual or corporate, who may be unable to survive, and whose income from his investment is destroyed by enforcement of the minimum wage, is relegated to the class of undesirable citizens or of "soulless trades" whose extinction, as "social parasites," should be hastened.[10]

3. Another inconsistent result, due to the inevitable working of natural economic laws, is that the general enforcement of a minimum wage in any industry would necessarily result in increase in the price of the product or wares in the market. Such rise in prices would increase the necessary cost of living, which cost is to be the basis at which the minimum wage is maintained. Experience has shown that increase in price is generally greater than a proportionate increase in the expense,

10 "Minimum Wage Legislation," by John A. Ryan, Catholic World, February, 1913. Also, Annals American Academy Political and Social Science, July, 1913: "The Minimum Wage as a Legislative Proposal in the United States," by Prof. Lindsay, page 45.

by reason of which prices are raised. The uncertainty of application of the compulsory minimum wage has to be guarded against and on account of that hazard the rise in prices would naturally be greater than that warranted at any particular time by the then arbitrarv increase in expense. The resulting change in the cost of living calls for a further increase in the minimum wage and that in its turn results in a further increase in the cost of living; and so, at least to certain limits, the tendency is to establish a sort of automatic lever acting at recurring intervals constantly towards a rise not only in wages, but also in prices, with the rise in one direction counteracting the effects of the rise in the other.

That this is the necessary tendency, and to some extent the inevitable result, of a compulsory minimum wage, is admitted by its advocates. They say, however, not without reason, that the menace of such an effect is not as great in practice as indicated by theory. The laboring class, much less that portion of it directly affected by the minimum wage, does not constitute the entire class of consumers. The effect, therefore, on prices, they say, would not be to the fullest extent claimed by those who urge fully these economic objections. The distinction thus made seems to be sound; but in any event it has to be admitted that the resulting tendency would be to eliminate the beneficial effect upon the laborer of the minimum wage and to unsettle the basis upon which such wage is from time to time computed.

A part of this same objection is, that the increased prices would, under economic laws, result in decreased demand for the product or wares in question and thereby diminish production. Diminished production in its turn is necessarily followed by diminished employment; and thus again the artificial interference with the natural law of supply and demand would in this instance result in an artificial increase of the number of unemployed; thereby decreasing, if not eliminating, the ultimate benefits to the laborer of a compulsory wage.

4. Again it is objected that the minimum wage, established by compulsion, while it might raise the wages of the lower classes of labor, would at the same time lower the higher wages paid under the present system to the higher classes of labor.

In other words, the minimum wage would tend to become the maximum wage. This question was much discussed during the last political campaign in connection with the Progressive party platform for a minimum wage for women, to be established by authority of the states and the federal government. President Wilson, in one of his campaign arguments, said with reference to this question:

> "If a minimum wage were established by law, the great majority of employers would take occasion to bring their wage scale as near as might be down to the level of the minimum; and it would be very awkward for the workingmen to resist that process successfully, because it would be dangerous to strike against the authority of the federal government."[11]

The only logical remedy to obviate this and many of the objections to the minimum wage would be the impossible one of establishing by law a general minimum wage scale for all classes of wage-earners.

That the compulsory minimum wage would threaten existing trades union scales and the present standard of wages for all classes of labor, has been shown by the experience in Australia, where the tendency is for the established minimum wage soon to become the standard wage scale. The class of unthinking employes, as well as their voluntary protectors who are apparently uninformed of the economic significance of a statutory wage, overlook this objection. The skilled students of labor questions, including labor leaders of experience, agree that the warning given by President Wilson is well founded. The San Francisco Labor Council recently declared itself "opposed to the principle of establishing the rate of wages, whether for men or women, by legislation." Samuel Gompers, President of the American Federation of Labor, while favoring a living wage, opposes a legislative or compulsory minimum wage for wage earners in private employ. He says: "I recognize the danger of such a proposition. The minimum wage would become the maximum, from which we should find it necessary to depart."[12] Mr. Gompers also has stated with reference to the compulsory

11 "The Legal Minimum Wage," by James Boyle, Forum, May, 1913.
12 "The Legal Minimum Wage," by James Boyle, Forum, May, 1913.

minimum wage: "I fear an outcome that has not been discussed, and that is, that the same law may endeavor to force men to work for the minimum wage scale, and when government compels men to work for a minimum wage, that means slavery."[13]

The objections, then, to the minimum wage are not all from the side of the employer.

5. Still another objection which involves many and varied difficulties is the fact that the compulsory minimum wage will not only throw out of employment entirely a large class of laborers dependent in whole or in part upon their earnings, but will maintain a barrier against the possible employment of all labor whose efficiency is below the standard of those entitled to the fixed wage. The employer cannot be compelled to, and he certainly will not voluntarily for any extended period, keep in his employ one whose efficiency is not up to or does not closely approach that measured by the minimum wage. Those below that standard would be gradually weeded out and afterwards kept out of employment. Under the present system those receiving a less wage than sufficient by itself to amount to a full living wage as defined, comprise generally those whose training, skill and experience are insufficient to enable them to give in return a service warranting the compensation of such wage. They comprise also those who by reason of indolence or other peculiar characteristics, inaptitude or indifference, can never reach the standard of accomplishment measuring up to the minimum wage. There are also those who, by reason of advanced years, fall below the standard required for the fixed wage. Then there are the hosts of those to whom employment in their earlier years is the main education and preparation for the power to earn, and whose employment for considerable periods at merely nominal or at comparatively low wages provides for them the means, or assists them in the means, of sustaining life while in the preparatory stages for their later work. Excluded altogether from employment by reason of the minimum wage, they would be compelled at their own expense of time and money to school themselves to the point of efficiency

13 E. F. McSweeney, in American Labor Legislation Review, February, 1913.

measured by that wage. These and other classes would be barred from any wage-earning opportunity, some of them permanently and some of them for long periods of time; and this deprivation of advantage would be accompanied by the burdens of preparation now shared between the employer and the employe.

It is true that the legislative minimum wage generally contemplates exceptions in favor of the weak, the aged, or those otherwise physically incapacitated. The scheme does not, however, provide in any way for the great mass of the unemployed which will be created and increased by its adoption. For this reason alone the results must be disastrous, at least until the same paternal government which has provided the minimum wage shall have provided for those who are thereby subjected to disadvantage and even to disaster. At the same time that the slow or inefficient or infirm worker is driven out of industry altogether into want and even pauperism, with the consequent deprivation not only to himself but to those dependent or partially dependent upon him, neither he nor those of his class can in this country ever look to a gradual betterment of their condition. The immigration of the lower class workers from Europe will continue to swell the hordes of the unemployed in this country. The arbitrary law of compulsory minimum wage, violating the law of supply and demand, will have the effect, as to every class of labor for whose benefit it is proposed, to decrease the demand at the same time that it multiplies the supply. The inevitable result must be such a lack of balance and adjustment in the social and political forces of the nation that catastrophe will follow. No remedy or prevention for the result of the over-strain of natural forces will be found.

Prerequisites to a Legislative Minimum Wage.

Too many advocates of the minimum wage assume that it lies within the power of the State, through its legislature, to furnish a panacea for all evils experienced under the present wage system. They and their proposed beneficiaries assume that, once

the Government fiat has been issued in legislative form, then immediate relief for all the lower classes of labor will come in the form of wages sufficient to maintain them in health and comfort. They do not consider, and if they do they blindly disregard, the inevitable workings of the natural law of economics which from its very nature will not of necessity yield to statutory law. There are certain laws of nature, economic as well as physical, which are and will remain paramount to human, statute law. They are Nature's limitations upon the legislative power of man, and as such they are paramount law, without being subject to amendment, even more controlling than the written prohibitions of our Federal Constitution are controlling upon the legislative power of the federal and state legislatures. Any state which sets up an artificial standard repugant to economic law must, if it hopes ever to establish and enforce such standard, provide in advance for the necessary readjustments inexorably demanded by the natural law which is infringed, and for the remedies of evils incident to the displacements resulting from natural forces.

The resulting evils of the enforcement of a compulsory wage standard, due to economic laws, have just been pointed out. They suggest the protective provisions desired and measures for which, so far as the State has the power, it would be the duty of the State to provide. The army of workers, male and female, with their families dependent upon them, who suffer from old age or from other misfortunes to which wage earners are liable and against which they have not themselves been able to make adequate provision, including those who by the minimum wage are relegated, perhaps forever, to the class of the unemployed, should be insured in some way by the State against the disasters of such misfortunes. Such insurance may include (1) an adequate system of workmen's casualty compensation; (2) organized illness insurance, cooperative or obligatory to the extent of the legislative power of the State, including invalidity and old age benefits.

One of the greatest needs for preliminary measures would be (3) providing for the misfortune of non-employment, through official and thoroughly organized employment exchanges, with bureaus collecting and reporting data with refer-

ence to the employment needs of the different occupations and the number and locality of various classes of employes. Such organized efforts in behalf of labor have been established in England, including even insurance against unemployment made obligatory upon a large class of employes and industries.

The next of the most important reforms to accompany or to precede minimum wage statutes should be (4) a comprehensive system in industrial trade education and for vocational guidance. These should be made not only a part of the public school system, but should be made the subject of special schools open to all present and prospective wage earners. By such means may be acquired, with less loss to the worker, that efficiency which shall measure up to the standard of the established minimum wage. The State has no right to bar from employment the worker of less than ordinary ability, or to deprive him of paying for his tuition by a diminution of his wages through his preparatory period, as would be done by the compulsory minimum wage law, without providing, to some degree, at least, a substitute for the advantages of which he is deprived.

Incidentally, also, (5) should be the enactment and enforcement of proper eugenic laws, in order to diminish the perpetuation of defective traits, physical or moral. Next (6) should be retained, and if necessary, extended in scope, the present system, so far as proper, of protective labor laws limiting the age of children workers, and protecting not only children but also women and men as to hours of employment in dangerous or unhealthy occupations and as to sanitary and healthful conditions in all occupations. These are all necessary to promote efficiency and to diminish the tendency of the minimum wage law to increase the number of unemployed.[14]

But of primary importance as a preliminary remedial measure (7), there must be more effective and more stringent restrictions upon immigration. All other reforms for the advancement of the employe and for the care of the unemployed will be worse than futile, while the gates at Ellis Island pour into this country a constantly arriving horde of the lower class of wage earners from Europe and other foreign countries. So

14 Annals American Academy Political and Social Science, July, 1913, page 3; "The Minimum Wage as Part of the Program for Social Reform," by Henry R. Seager, Professor of Political Economy, Columbia University.

long as the army of the unemployed and of the incompetent is recruited through the present unrestricted immigration, the evil results, due to economic laws, of compulsory minimum wage will be increased and intensified. More than that, all attempts at remedies or readjustments, whether by the State or by organized co-operative effort, will be rendered futile.[15]

When these reforms are set in motion and made effective, and only then, would it be possible to expect any substantial benefits from a compulsory legislative minimum wage. These considerations are entirely apart from the question of the practicability of any particular minimum wage statute, or of the constitutional power of the legislature to pass and have enforced any particular statute, or a minimum wage statute at all.

The Efficacy of Promoting Co-operation.

To these objections upon economic grounds above enumerated might be added many others which have been urged; but these are sufficient to show that the advisability of a compulsory minimum wage, though based upon a living wage, is not a self-evident or self-supporting fact. The questions involved are far-reaching. The objections shown by a consideration of natural economic laws are serious questions, to say the least. They must be answered satisfactorily before it is demonstrated that a compulsory minimum wage is either a practicable or wise policy. The economic objections do not apply to the same extent to a non-compulsory minimum wage,—that is, one which is worked out by individual and organized co-operation, or where even under a legislative minimum wage the practical effect is only to promote voluntary co-operation,—as they do to a compulsory wage in the United States. The success claimed for the minimum wage in New Zealand and Australia is not at all a conclusive answer. It has been in operation there only during times of prosperity. It must be considered an experiment until it is demonstrated that such laws can stand the stress of adversity. Neither has its success been demonstrated by the experience in Great Britain, where the

15 Annals American Academy Political and Social Science, July, 1913, page 66: "Immigration and the Minimum Wage," by Paul U. Kellogg, Editor of The Survey.

minimum wage has been applied only to a few sweated industries and also to workers in mines. The British expert, Mr. Ernest Aves, after a thorough investigation in Australasia, reported to his government as follows:

> "The evidence does not seem to justify the conclusion that it would be advantageous to make the recommendations of any special Boards that may be constituted in this country legally binding, or that if this power were granted it could, with regard to wages, be effectively exercised."[16]

How much more difficult, then, would it be in this country, where the statutes of its legislatures are not at the same time the fundamental constitutional law. The question before the British Parliament as to a minimum wage statute was alone a question of policy or expediency. In this country the same question is involved and always at the same time the question of consistency with our system of government, expressly limiting legislative powers of the states or of the nation as against infringements of the right of contract, of personal liberty, and of the preservation of property rights.

Another reason, as stated by Mr. Aves, for the inapplicability of the experiment, as applied in New Zealand or in Australia, to a country like Great Britain or the United States, is the fact that there only a comparatively small number of workers have been or were intended to be affected by the minimum wage. So small is their number, he says, that it is "as though the whole machinery of propaganda and of the government were concentrated on a city somewhat smaller than Birmingham."[17]

Mr. Aves says, too, referring to results in New Zealand and Australia, that under the minimum wage law men find great difficulty in retaining situations when they pass middle age; and it becomes harder for the slow or inefficient worker to get a job, as the employers will not pay them the legal wage. Referring to the system in Victoria, the Massachusetts Commission on Minimum Wage Boards says that:

> "These special boards, although authorized to secure a 'living wage,' in practice have served rather to formulate common rules for a trade, to bring employes and employ-

16 "The Legal Minimum Wage," by James Boyle, Forum, May, 1913.
17 "The Legal Minimum Wage," by James Boyle, Forum, May, 1913.

ers into co-operative rules and to provide suitable machinery for the readjustment of wages and other matters to changing economic conditions."[18]

The system as so administered is not considered antagonistic by either the propertied interests or the employer.

Thus far, therefore, so far as the practical application of the compulsory minimum wage is concerned, any practical beneficial effects have been, not through the enforcement of its compulsory features, but by reason of the official promotion of co-operation between employers in raising the standard of wages.

Voluntary Aid by Employers.

In connection with the subject of minimum wage by voluntary co-operation, and as preliminary to a discussion directly addressed to the legislative minimum wage, let us consider the present attitude of employers, and particularly those who would be first affected in Minnesota, with reference to benefits, by means of increased wages and in other ways, to their employes.

The first proceeding of the Minnesota Commission to establish a minimum wage was taken with reference to the employes in the mercantile houses, particularly the department stores, of the two cities, Minneapolis and St. Paul. The nature of the retail mercantile business requires classes of labor varying most widely in the demands for ability. Organization of such a business necessitates the employment on the one hand of high-salaried experts from the managing head to the sub-managers and overseers, and on the other hand of a class of help of whom little or no experience or preparation is required, together with all the intermediate classes. On account of the low standard of proficiency required in the primary departments, the positions are sought by minors, particularly young girls, who, forsaking the advantages of the public free school system, seek to become

18 See Report Massachusetts Commission on Minimum Wage Boards, January, 1912, pages 14-15; "The Principle of the Minimum Wage," by A. C. Pigou, Nineteenth Century, March, 1913; "Minimum Wage and Its Consequences," by Sidney Brooks, The Living Age, May 11, 1912; "The Economic Theory of a Legal Minimum Wage," by Sidney Webb, the Journal of Political Economy, December, 1912; "Massachusetts and the Minimum Wage," by H. LaRue Brown, Chairman of Massachusetts Minimum Wage Commission, Annals Academy Political and Social Science, July, 1913, page 13, 16, 17.

in some measure an asset instead of a charge upon their parents at home. Some of them would be unable to earn or to receive a minimum wage based even upon a mere living wage. At the lower wage, however, they are able to help sustain themselves and at the same time, by actual training, to add to their efficiency and their ability later to earn and to receive higher wages. Among the regular and more experienced employes, generally women, who attend to the retail sales, opportunities for advancement in position and in wages are always open. The more attentive and serious advance, while the positions of the careless and indifferent ones remain at a standstill unless they are compelled to drop out altogether. Primarily it is the law of supply and demand which governs not only the obtaining, but also the retention of their positions, including the wages which they receive. Under the present system it generally depends upon the girl herself whether she advances in proficiency and in wage-earning capacity. In most instances her efforts for advancement are promoted and encouraged by the assistance of her employer, who recognizes the fact that it is for his interest to raise in his establishment the standard of efficiency, to promote the health, happiness and well-being of his employes, and to raise them as fast as possible, not only to the standard of a minimum living wage, but as much further as possible.

It is not true as to the mercantile establishments of Minnesota, and particularly of the Twin Cities, that there is generally any inconsiderate or illiberal treatment of the lower-paid classes of employes. None of the retail merchants of the Twin Cities are opposed to a minimum wage as such. Neither are they opposed to any workable, practicable method, whether compulsory or otherwise, for raising the standard of wages, even by a legislative minimum wage, if only they may be assured that it will work out as a practical benefit to their employes and at the same time not create insurmountable obstacles to the continuance of their business enterprises. They stand without exception for the promotion of the health, happiness, morals, comfortable living and general prosperity of their employes. When, however, they are asked to submit to a proposed recommendation of a statutory wage commission that they, or certain

of them in this particular locality, shall pay to each and all their employes without exception not less than an arbitrarily fixed sum, they naturally inquire, whether, under the workings of the statute in question, they are to be singled out as against competitors in the same line of business, or are to be affected in equal degree so that artificial barriers will not be created against their otherwise free competition. In other words, they join in the very reasonable inquiry: Is the statute, to which they are asked to submit, a workable or enforcible law?

The answers to such inquiries will be suggested later in this discussion; but right here let me emphasize the fact of the good faith of such employers in hesitating to co-operate at once in the absence of satisfactory answers to such inquiries. The retail merchants of no locality have done more to demonstrate a spirit of co-operation in the welfare of their employes than have the merchants of the Twin Cities. It is not uncommon that in a department store a well-organized school of instruction is maintained, not only free of expense to the employe, but with the privilege of attendance upon time paid by the employer. To these, in many instances, is added the feature of special lectures by experts in the different branches of the business. Then there are sanitary and well-fitted rest rooms where the girls may obtain temporary refuge and rest from the exactions and turmoil of their daily work. This is only a part of the benefit from well-organized welfare departments operated under competent supervision and through which close personal contact is maintained with the employe, not only in connection with her work, but outside, and even extending to her domestic life.

A common source of help is the maintenance by the employer of a mutual benefit plan, by which the employe receives aid in times of sickness; death benefits are also included. Beside contributions by the employes, the employer often adds to the benefits by voluntary contributions. The higher class of help who are more able to take advantage of such opportunities are, by many employers, allowed to purchase an interest in the business, paying on time. Encouragement to thrift is also given to the lower paid employes through deposit departments, where savings deposited draw the full legal rate of interest.

In some instances the employer has further encouraged savings by starting an employe's savings accounts out of his own funds. One Minneapolis mercantile house has established in the heart of the city a lodging house, where otherwise homeless girls may have for extended periods of time a home with all reasonable comforts and at only a nominal expense—indeed, at an expense much less than the actual cost to the employer. No single enterprise could be more conducive to the preservation of the morals, health and comfort of the girl wage-earners who have not at hand the ordinary home comforts. The same employer recognizes the salutary effects of wholesome vacation periods which to the low-wage earner are only inadequately available; and he plans to construct a little colony of cottages upon the lake shore in the country for the exclusive use of employes upon their summer vacations. These opportunities will be afforded for less than cost and at a price within the reach of the lowest wage earner.

A comparison of the wage-cost percentage of sales in the business of mercantile houses throughout the country shows that such percentage is one-quarter greater in Minneapolis and St. Paul than in any other cities of their size. This is a further proof of the already existing co-operative interest on the part of the employers in mercantile houses in the Twin Cities in behalf of their employes.

In the light of the foregoing, let us now examine the minimum wage as a subject not merely of ethics or of economic law, but of legislative enactment.

THE LEGISLATIVE MINIMUM WAGE.

As we have already seen, the tendency is that any evil effects through the establishment of a minimum wage, due to the consequent strain or violation of natural economic laws, are experienced to the degree that such strain is enforced and made inelastic by compulsion. Voluntary or co-operative establishment and maintenance of a minimum wage leave opportunity and means for necessary adjustments and readjustments by which the evil results, otherwise following from defiance of natural law, may be remedied in whole or in part.

Two classes of inquiry confront the legislator who has to determine the policy of a minimum wage statute. His first inquiry is as to the general expediency of such a law; and such inquiry involves not only the ethical questions, but particularly the questions of economic law. Outside of the question of constitutionality: Is the statute as framed workable? Is it expedient? Will it work out in practical results beneficial to the greatest number? Will it be ultimately to the advantage of the particular employe class for whose benefit it is proposed? If so, will such benefits be counter-balanced by greater harm to the employer class or to other classes, either the employes or the general public? Next, as in the case of all statutes contemplating the restriction of the liberty of contract, or compelling one citizen or one class of citizens to sacrifice something of their property or earnings for the benefit of another class, or interfering with the natural laws of competition, the question presented to a legislator is: Whether the police power of the State gives to its legislature under the existing circumstances the right to enact and have enforced a statute which in its practical workings must have, to some degree at least, the disadvantageous results suggested?

The experience with legislative minimum wage has been so slight that, as stated by Mr. Aves, the British expert who made investigations in Australia, it can as yet be considered no more than as mere experiment. It is, therefore, manifestly unwise to fly in the face of experience, or rather in the face of inexperience, to the adoption of a measure drastic and far-reaching in its effects. Moreover, if the minimum wage is to be the subject of legislative enactment, the particular methods of legislative supervision in the proposed statute should be carefully scrutinized in order that any proposed method of the application of the legislative minimum wage may not be objectionable as against another which might be acceptable.

Minimum Wage Legislation in the United States.

So it is that we find that in the United States the methods contemplated by the different statutes vary from the voluntary legislative minimum wage in Massachusetts to the arbitrary statutory wage established without investigation by the legisla-

ture of Utah. The people of Massachusetts, through their legislature, approached this question in a judicial attitude, but with the utmost caution. Their conservatism did not spring from the prejudice of the propertied interests, but rather from the consciousness of an enlightened citizenship which recognized, after deliberate consideration and study, the difficulties presented by reason of the inevitable effects of natural economic law. They chose the method in the application of which the obstacles presented by the natural laws of business and of competition would be the most minimized. This, too, was only after a state commission under the legislative resolution of 1911 had spent a year in careful investigation followed by a full report of its findings and recommendations.[19] Following this report, the Massachusetts legislature of 1912 adopted a non-compulsory act which provided for investigation and recommendation by a Commission of a minimum wage for women and minors, and with power to publish their recommendations and the names of employers not submitting thereto. But even such power of publication could not exist until after full hearing and adjudication upon notice to the employer and with privilege to the employer to appeal to the courts to have adjudicated the question as to whether the minimum wage rate imposed upon him was, under all the circumstances, fair and reasonable.[20] That act recognized the fact that the principal efficacy of legislation is the promotion of co-operation in the effort to raise wages, and that a drastic compulsory act would result, not only in consternation among employers, but also in discrimination and even in disaster to business, at the same time that it prevented the necessary readjustments which only co-operation would be adequate to bring about.

The Nebraska statute of 1913 follows substantially that of Massachusetts.[21] Compulsory acts with penalties for refusal to comply with the order of the State Commission fixing the minimum wage, were passed by the legislatures of 1913 in Oregon, Washington, Colorado, Wisconsin and Minnesota. Also in California, together with a proposal for the adoption of a con-

19 Report 1912 Massachusetts Commission on Minimum Wage Boards.
20 See Massachusetts Statute, Appendix III.
21 See Appendix III.

stitutional amendment authorizing a compulsory legislative minimum wage. In Ohio in 1912 there was adopted a constitutional amendment authorizing laws establishing a minimum wage. In Utah the Wage Commission feature of other state statutes is entirely eliminated, and the 1913 legislature passed a statute making it unlawful to employ females at less than a specified rate for minors, another specified rate for adult learners and apprentices, and another specified rate for experienced adults. There is no distinction between different classes of employments, and a breach of the law by any regular employer is made a misdemeanor.

These acts are generally made applicable to women and minor employes, and the basis for computing the minimum wage for any employe or class of employes in any occupation is that it shall be adequate to furnish them a living with reasonable comforts. Most statutes are made ostensibly under an assumed police power of the state to protect, through the minimum wage, the health and morals of the employes affected. They generally provide for a hearing upon notice to the employer before the final order of the Commission is promulgated fixing the minimum wage applicable to such employer, and with the right of appeal to the courts in case such final order shall be unsatisfactory. The absence from the Minnesota statute of that usual protection to the employer is, as will be shown later, one of the peculiarities which make that statute particularly open to objection.

A summary of the minimum wage statutes adopted in the United States up to the present time is given in the Appendix.[22] The Minnesota statute of 1913 is shown in full.[23]

Minimum Wage Statutes in Other Countries.

The legislative wage is not a new idea. It appeared first in the form of a maximum agricultural wage at several periods in the early history of England. These maximum wage statutes were the outcrop of the oppression of the lower classes, and particularly laborers, and in favor of the landed interests, which was indulged in from time to time by Parliaments not sufficiently representative of the common people. They were

22 See Appendix III.
23 See Appendix I.

of the same unscientific class as statutes regulating the prices of land, of flour, of fuel, and of other necessaries of life. These odious statutes of labor, in the time of Henry VI and Edward III prohibited the laboring man from seeking employment outside of his own country, compelled him to work for the first employer demanding his service, and punished him for any violation. Referring to these statutes, as well as to the modern minimum wage statutes, the Supreme Court of Indiana recently said:[24]

> "In the very nature and constitution of things, legislation which interferes with the operation of natural and economic laws defeats its own object, and furnishes to those whom it professes to favor few of the advantages expected from its provisions."

From the beginning of the nineteenth century, English labor statutes have been framed for the protection of the laborer. These include the factory acts promoting safe and sanitary conditions for labor, limiting the hours for dangerous or unhealthy occupations, and the acts for workmen's compensation in case of casualty, and other measures, many of which in form or in spirit have become or are becoming statutory measures in this country.

The statutory minimum wage, however, is a modern idea. It first appeared in Belgium in 1887 in the form of a minimum wage statute for laborers employed in public work. This, as we shall see, is far different, upon both economic and constitutional grounds, from legislating a minimum wage for private employment. In jurisdictions with constitutions, limited or unlimited, the power of the State has always been recognized, to legislate as to the terms of labor contracts in which the State itself or any of its municipal subdivisions, arms of the State, should be a party.

The first legislative minimum wage applying to private employment was adopted in Victoria in 1896 and was soon followed by similar statutes in other Australian provinces and in New Zealand, and has been in force in England since January,

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24 Street vs. Varney Electrical Co., 160 Ind. 338.

1910.[25] These Australian and English acts applied to both male and female employes. It should be kept in mind that there is no constitutional limitation of the power of Parliament in such matters. When Parliament has determined the question of the expediency of a policy, its expression in statutory form becomes both the statute and the constitution. The English Parliament had the benefit of the experience of New Zealand and the Australian provinces, and also of the special investigation and report by the British expert Aves upon the results, theoretical and practical, of such legislation in Australasia. As already shown, his report was that the real practical benefit of these statutes was to promote voluntary co-operation on the part of the employer;[26] and that the conclusion was not then (in 1909) justified that the recommendations of any special wage board should be made legally binding in a country like England, or that such power, if granted, could be effectively exercised. He deemed these attempts in the Australian provinces and in New Zealand as yet mere experiments, even in those countries, and that their apparent success was due to the prevalence of good times since their adoption, and to the fact that they applied to a small, centralized government, and were limited to only a very small number of workers, and thereby presented much less and entirely different difficulties of application from those which would be confronted in a country like England or the United States.[27] England, therefore, proceeded cautiously, and the act of 1909 was applicable to only four trades in which much sweating existed, and it was also extended to all workers underground. The English statutes must still be considered experimental. They are being applied by thoroughly organized wage boards, but dissatisfaction is expressed, not so much as to the rate of wages established, as to the system of the minimum wage, and not only by employers, but by employes.

The adoption of a minimum wage in this country, beginning with the Massachusetts act of 1912, was borrowed, as was other

25 The Trade Boards Act, 9 Edw. 7, Chap. 22, adopted Oct. 20, 1909; Report Massachusetts Commission on Minimum Wage Boards, 1912, page 14-161; Annals of Academy Political and Social Science, July, 1913, "The Minimum Wage as a Legislative Proposal in the United States," by Prof. Lindsay, pages 45-46, and "The Minimum Wage in Great Britain and Australia," by Prof. Hammond, pages 25-26.

26 Report Massachusetts Commission on Minimum Wage Boards, June, 1912, page 14.

27 "The Legal Minimum Wage," by James Boyle, Forum, May, 1913.

labor legislation from England. It is obvious that the fact of the adoption of such legislation by England, and even of its practicability and enforcibility in that country, would not be conclusive of its practicability or enforcibility in this country. Its attempted application here is confined by the statutes to females and minors, in order to make its proposed beneficiaries within a class sufficiently distinctive for the basis of some argument in favor of justification for such legislation under the police power of the State. This is on the theory that women and minors are generally, as a class, weak in bargaining power, and peculiarly entitled to the protection of their health and morals through paternalistic legislation which could not be enforced here as to male adult workers.[28]

The Minnesota Statute of 1913.

We now come to the Minnesota statute of 1913[29]. In the light of what has been said a mere reading of that statute, which is printed in the Appendix in full, would disclose to any reader that there are serious questions presented in regard both to its practicability and its enforcibility. It was not, then, surprising that the first Advisory Board which was called to consider the question of a minimum wage as applied to mercantile occupations in the Twin Cities, should have found it impossible to proceed without first having satisfactorily answered certain questions suggested from the very terms of the statute. These questions and a resolution asking for their answer are printed in full as a part of the Appendix.[30] These questions, with the exception of the last, go primarily to the practicability or workability of the statute, even if it shall be considered constitutionally enforcible. The final question is as to its enforcibility, and, therefore, involves a discussion of its constitutionality. Let us take up these two classes of questions in their order:

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28 Annals American Academy Political and Social Science, July, 1913: "The Minimum Wage as a Legislative Proposal in the United States," by Samuel M. Lindsay, Professor of Social Legislation, Columbia University; also, "The Minimum Wage in Great Britain and Australia," by Matthew B. Hammond, Professor of Economics and Socialogy, Ohio State University.

29 See Appendix I.

30 See Appendix II.

Practical Questions Suggested Under the Minnesota Statute.

Among the many questions propounded, together with others suggested, are the following:

1. Can the Commission fix a minimum wage for any occupation in one district of the state, without reference to that occupation in the state as a whole?

Section 2 empowers the Commission on its own motion, to, or, on request of one hundred persons in any occupation, it must, proceed to investigate the question of wages paid to women and minors in such occupation in the state. It is only "after" such investigation,—that is, state-wide,—that it may determine the minimum wage for such occupation "throughout the state," or within any area of the state if differences in the cost of living warrant this restriction (Sections 5 and 6). As to any occupation, it may establish an Advisory Board whose recommendation, which may be approved by the Commission, is confined to minimum wages in the occupation in question as provided in Section 6 (Section 9). But Section 6 requires the investigation to be state-wide.

Now, these powers, delegated by the legislature, cannot extend further than the terms expressed in the provisions by which the delegated power is given. Morover, it is manifestly partial and discriminatory between employers in the same occupation to attempt to apply the compulsions of the statute to one city, or to any particular part of the state, without applying it to the entire state for that occupation. This is true, whether the rate of wage is uniform, or varied in different localities.

2. The preliminary investigation, which is a pre-requisite to the power of the Commission to act, must show that one-sixth of the women and minor employes in any one occupation in the entire state receive less than living wages.

This is the provision of Section 5, and the "opinion" required of the Commission that one-sixth receive less than a living wage, must, under well-known rules, be not the arbitrary guesswork of the Commission, but a conclusion founded upon the state-wide investigation expressly required.

Moreover, the preliminary investigation must be, as to each

of the classes, "women" and "minors"; and the requisite basis must be established for women before a minimum wage can be established for women. So, as to minors.

3. Can a separate minimum wage be established for women and another for minors; and can there be a different wage for male minors from that fixed for female minors?

The only basis upon which the Commission is empowered to fix a minimum wage for any employe or class of employes, is that it shall be a "living wage" and such living wage is defined as the wage "sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life." The term "woman" is defined as a female 18 years of age or over; and the term "minor" as a male under 21 years of age or a female under 18 years (Section 20). Now, it is apparent that the minimum wage cannot be fixed as to each individual according to what is for him or her a "living wage," as defined. The basis of computing the rate, applicable to any class or classes of employes, is expressly limited to "a living wage" as defined. By limiting it to "a living wage" consistent with "reasonable life," the act, by its terms, views each employe and each member of any class of employes, and indeed employes of all classes, merely as human beings having life in which they are to be supplied with health and the necessary comforts. No distinction is attempted, and it is manifest that none can be made, for the different standards of living. The standard which is to be the basis is fixed by the express terms of the statute and that statutory standard applies equally to all employes whose minimum wage is to be fixed. Therefore, there can be no different standard recognized as a basis for fixing the minimum wage for a woman minor from that fixed for a male minor. Neither can there be any difference recognized between the minor, whether male or female, of 17 years of age and the minor who is only, say, 12 years of age. The standard fixed is applied to the employe as a person, independent of his other means of sustenance or support. Again, no different standard of measurement could be applied to the female minor of 17 years or to the male minor of 20 years, than is applied to the "woman," not minor, of 18 years, or of 22 years, or more.

Consequently, the minimum wage to be fixed as to any occu-

pation in any one locality cannot vary as between minors, male and female, and adult women; neither can it vary between male and female minors.

4. The statute does not allow for any distinctions between experienced workers or workers of ordinary ability and those who are merely learners or apprentices.

In terms the statute requires an advisory board, with reference to any occupation in question, to recommend a minimum wage sufficient (1) "for women and minors of ordinary ability;" and (2) "for learners and apprentices" (Section 8). It is provided that the terms "learner" and "apprentice" mean either a "woman" or a "minor" and that the term "worker" or "employe" means either a woman, a minor, a learner or an apprentice (Section 20). But, as already shown, there is no provision for any adjustment or variation as between any of these last named four classes.

The basis of computing the minimum wage is confined to making it a "living wage" for the employes to which it is applicable. The statutory definition of "living wage" is the same for each and every employe and for each and every class of employes. A learner or apprentice may be either a woman adult or a woman minor; or either a male minor under 21 years or a female minor under 18 years. The statute can affect none except women or minors, so that adult male learners or apprentices are excluded from even the terms of the act.

Manifestly, then, there is no power to compute a minimum wage for learners or apprentices at a different rate from that for any and all other classes of employes affected; because the minimum wage itself and its basis of computation are fixed up to the full living wage as applied to the employe as a person, without distinction by reason of the time of his employment, the amount of his efficiency, or the fact whether he is classed as one kind of an employe or another.

5. The reasons already shown answer the other inquiries under paragraph 4 of the questions propounded by the Advisory Board.

The same minimum wage must be fixed for all classes of employes to which it is applied in any occupation in any locality. By the terms of the statute, there is prohibited the possibility

of any consideration being given to the fact that the standard of living of one employe is higher than another, or that the standard of one class of employes is higher than another. Moreover, the standard of computation is so fixed by the statute that no consideration can be given to the ability of the employer to pay. Again, no variation can be made on the ground that any employe or class of employes has to contribute to the support of others dependent upon him; nor that the employes themselves may be receiving the benefit or aid of contribution from their relatives or others. This alone shows the insufficiency of the statute, its impracticability as a working measure, and its unreasonable provisions, resulting in discrimination, not only between the employes themselves, but also between the employes and employers and also between different employers in the same occupation.

The inelastic basis fixed by the statute for the computation of the minimum wage prohibits also any consideration to be taken of the advantages, educational or otherwise, which the employe receives from any particular employment, whether such employe be a learner of the occupation in which he is engaged, or otherwise. These considerations, in practice, have always influenced, and very properly so, the amount of wage which is reasonable for the employe, and which the employer is willing and able to pay. But these reasonable considerations in fixing the wage are precluded by the terms of the statute. No matter that an employe and an employer should afterward agree upon a reasonable wage, computed in view of these and other reasonable considerations, nevertheless, if it happens to be, even for a short time, less than the fixed statutory minimum wage for such employe, the latter may repudiate his contract, retaining all the advantage, and sue his employer for the difference (Section 14), and such employer also may be fined and imprisoned (Section 19).

In view of the foregoing, it is manifest that when the minimum wage is fixed for women and minors in any particular occupation, one of two things must occur. The necessary uniform wage, impossible of variation to suit the different classes of employes and the different circumstances of their employment, must either (1) be made on the basis of the standard of the low-

est of the members of the class of employes affected; or (2) it must be placed at a rate above the lowest standard and perhaps up to the highest standard of any employes affected. In either case, such minimum rate cannot be satisfactory to all employes affected. In case the former method is adopted, the minimum fixed will tend to become the minimum for all lower class employes. In both cases, all employes of an efficiency less than that measured by the wage-rate fixed will go out of employment, the number thus forced out increasing as the minimum rate is raised; so that in the latter case, of a minimum rate computed by the highest standard, the greatest number of employes are forced out and deprived of the advantages of learning a trade or business and of receiving some wages which will at least assist in their sustenance during their apprentice period.

Accordingly, without touching the question of constitutionality, having in mind the general objections to a statutory minimum wage based upon practical economic questions, already presented, it is obvious that the Minnesota statute of 1913 is exceptionally narrow in its scope and terms, and is impracticable both from an economic viewpoint and business viewpoint and from the viewpoint of an employe as well as an employer; and that, with its present terms and provisions, it is unworkable. It is so defective that it could not serve the purpose,—which heretofore has been found to be the main, if not the only real, practical, salutary effects of such statutes,—of promoting co-operation between employers and the State Wage Commission in the cause of better pay for wage earners.

Such co-operation would be further discouraged and prevented if the statute should be finally determined by the courts to be unenforcible against any employer or class of employers to whom it is attempted to be applied. In such event, also, the entire work of the Commission theretofore done would be futile, and the general cause represented by the advocacy of a minimum wage would be discredited; to say nothing of the great expense of time and trouble which would have been wasted. Many employers, particularly in the retail mercantile business, are, as we have seen, ready to co-operate to any reasonable degree with any proposition or measure for the betterment of their employes, and would gladly join in the establishment of

a minimum wage at a fair and reasonable rate, if they could be assured that ultimately their acquiescence and co-operation with the work of the Commission could really be expected, under the statute in question, to bring about the results proposed. It is reasonable that they should desire to be assured that by their unqualified acquiescence in the orders promulgated by the Commission, they would not thereby make themselves the subjects of unfair and unreasonable discrimination in favor of competitors. It is reasonable to demand an answer to the question: If certain employers acquiesce and co-operate, and thereby bind themselves to the orders finally promulgated by the Board, then will other competing employers in the same occupation be compelled to adopt the same minimum wage? Otherwise, voluntary acquiescence means not only no benefit in the end to the employes in question, but it means loss and perhaps disaster on the part of the employers acquiescing. It means at the same time that the recalcitrant employers reap not only temporary but permanent selfish advantage and profit.

The question of constitutionality is therefore a proper one, and a vital one, and its careful consideration is of the utmost importance in the interests of the employes, in the interests of employers, and in the interests of the members of the State Commission and its Advisory Board, including all the forces which are working to the establishment in this state of a minimum wage for women and minors.

Next, therefore, I take up the final question recently propounded by the Advisory Board: Is the Minnesota statute enforcible?

The Minnesota Statute Is Unconstitutional.

The theory upon which the Minnesota statute is based, as a constitutional question, is shown by the following propositions which will be urged by those arguing in its support:

(1) While the statute has the effect to limit the right of contract in private employment, also to compel an employer, so long as he retains certain employes on his pay roll, to pay them in excess of what they earn and thereby compels the employer to contribute to the sustenance of the employe without

regard to consideration, and although it has the effect to discriminate between the employer affected and other employers within or without the state who are in the same class,—yet neither for this or for other reasons is the statute necessarily repugnant to the constitutional prohibition against statutes having such effects, because it is a statute the prime object and effect of which are to protect and safeguard the general public welfare, in that it promotes the general health and morals of its citizens and particularly of that class of citizens to whom it applies, and therefore it is justified as a proper exercise of the police power of the State.

(2) That the statute has the same basis of constitutionality as statutes which have been sustained, regulating certain rules between employer and employe, including those compelling healthful and safe conditions and instrumentalities for work; those restricting hours of labor and even a minimum wage for employes engaged in public employment or in public work; those limiting the hours in private employment in occupations in their nature peculiarly and necessarily unhealthful or hazardous; and also those providing employment restrictions peculiarly necessary, in the instances in which the statutes are applicable, to the protection of women or minors, as such, and as distinguished from the less stringent restrictions assumed to be necessary for the protection of men adult employes.

(3) For the reason that the police power has been sustained as the basis for certain statutory regulations, applicable to certain cases of employment in favor of women, as such, and in favor of minors, as such, which presumably, under the decisions, could not be applied to adult male employes; therefore, any statute regulative of employment of women, or of women and minors, if only its purpose be made ostensibly to appear as one to preserve or promote the morals and health of the intended beneficiaries of the act, must be sustained as within the police power of the state.

(4) The Minnesota minimum wage statute, applying to women and minor employes, *engaged in any occupation,* is just such a statute as is described in the last premise. It is, therefore, within the police power, no matter that it restricts the liberty of contract, takes the property of one for the benefit of another, and has many effects which, otherwise than for the paramount nature of the police power, would make it repugnant to the well known constitutional limitations prohibiting statutes depriving citizens of their liberty or property without due

process of law, discriminating between citizens of the same class, unduly delegating legislative power, and other limitations safeguarding well recognized individual personal and property rights.

Any argument in favor of the constitutionality of this statute, however expressed, will, when analyzed, resolve itself into an attempt to support the propositions of law as above expressed. It requires only a cursory examination of the authorities to disclose the fallacy of that argument.

There has been no decision of any appellate court, federal or state, sustaining a statutory compulsory minimum wage for either men or women or minors in any private employment. No inferior court, federal or state, has sustained such a measure, with the exception of the recent decision of Judge T. J. Cleeton of the Circuit Court of Multnomah County, Oregon, in the case of *Frank C. Stettler,* plaintiff, vs. *Edwin V. O'Hara, et al., members of the Industrial Welfare Commission of the State of Oregon,* defendants. This case was brought to test the constitutionality of the Oregon minimum wage statute, which, as herein shown, by reason of its provisions for hearing and notice and other provisions, is less open to the charge of unconstitutionality than is the Minnesota statute.

Judge Cleeton, in his decision, takes the position that, as the question involved was undetermined by any decision of the highest courts covering the precise question, he would, for the time, solve all doubts in favor of the constitutionality of the statute, in order that on appeal to the higher courts the question might be there determined. The case is now pending in the Supreme Court of Oregon.

In order further to direct attention to the precise questions here involved, and to show the fact that the very distinctions made in the decisions of the highest courts in cases of other statutory regulations in labor matters point very clearly to the conclusions herein reached, I will next show that certain decisions and classes of decisions which are cited in support of a statutory minimum wage for employes in private employment, not only do not support such a minimum wage, but are conclusive against it.

Such decisions are those (1) upholding statutory hours or

wages for employes engaged *in public work;* and (2) next, decisions upholding statutory hours for employes engaged in *exceptionally unhealthy or hazardous occupations,* and then (3) decisions extending the police power of statutory protection to women beyond the limits established for men, and showing the grounds of the distinction in favor of women and *the limits within which such distinction is permissible.* Such examination will show that the statutory limits of regulation of employment of women under the police power are so established as to prohibit the statutory minimum wage for women and minors as provided by the Minnesota act of 1913.

In other words, it will be shown that the decisions cited in support of this minimum wage not only do not support it, but on the contrary are against it. To this showing will be added decisions directly adjudicating that such statutory minimum wage for private employment is unconstitutional.

Decisions as to Employes Engaged in Public Work.

A Kansas statute regulating the employment of all laborers, in any public work, to an eight hour day, was upheld by the United States Supreme Court, without reference to the question of police power, on the ground that the State had the power to prescribe the conditions upon which it, the State, or any of its municipal divisions, which are a part of the State, should enter into contracts for labor. As said by Justice Harlan, who wrote the decision:

> "Whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the State to declare that no one undertaking work *for it or for one of its municipal agencies,* should permit or require an employe on such work to labor in excess of eight hours each day, and inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may chose to adopt, without regard to the wishes of the State. On the contrary, it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit *public work*

to be done on its behalf, or on behalf of its municipalities."[31]

The Court, in the same decision, expressly holds (page 218) that the question of police power, touching the regulation of hours in private employment in hazardous occupations, such as was discussed in the case of *Holden v. Hardy,* 169 U. S. 366, was not involved for the reason, as shown by the quotation just given, that the work was public work.

What is more significant, the Court says:

> "No question arises here as to the power of a State, consistently with the federal constitution, to make it a criminal offense for an employer *in purely private work* in which the public has no concern, to permit or to require his employes to perform daily labor in excess of a prescribed number of hours."

Then distinguishing the case of *Holden v. Hardy,* in which the limitation of hours for laborers in underground mines and smelters to eight hours, was supported on the ground of the exceptional hazards of the employment, the Court said:

> "As already stated, no such question is presented by the present record; for, the work to which the complaint refers is that performed on behalf of a municipal corporation, *not private work for private parties.* Whether a similar statute, applied to laborers or employes in purely private work would be constitutional, is a question of very large import, which we have no occasion now to determine or even to consider."[32]

This decision established the principle that statutory regulation of hours, or even of wages or any other condition, as applied to contracts or employment *for public work,* does not present the question of police power; that such a statute is within the power of the State, on the ground of public policy, which leaves to the State the power to control the conditions of contracts to which it or its municipal subdivisions shall be a party for the purpose of its own public work.

This authority is recognized in the recent Washington decision where a state statute not only regulated hours, but fixed

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31 Atkin vs. Kansas, 191 U. S., 207, 222.
32 Atkin vs. Kansas, 191 U. S., 207, 218-219.

a minimum wage for employers engaged in public work. It was upheld by the Supreme Court of Washington on a second hearing, on authority of the reasoning and conclusion in the case of *Atkin v. Kansas*.[33]

Cases, therefore, decided on the ground that the work involved is *public work*, not only do not apply, but they clearly make a distinction as against cases of private employment and indicate that any general statute regulating hours or wages in private employment must, as to the classes of labor to which they apply, be based upon distinctions clearly sufficient to bring them within the police power of the state.

This leads to the distinctions made with reference to private employment.

Decisions as to Employes in Exceptionally Unhealthful or Hazardous Occupations.

It has never been held that, as to men or as to women, statutory restrictions of hours or wages could be enforced, except as to employment in such exceptionally unhealthful or hazardous occupations, that the peculiar hazard to health, life or limb of those occupations justified the statute as a police power regulation of the health or safety of the employes embraced in the act.

On this principle it has been decided in many cases, which holding has been supported by the United States Supreme Court, that hours of labor might be limited in private employment in underground mines, smelters, etc. A statute of Utah made such limitation at eight hours and in upholding that statute as a proper exercise of the police power, the United States Supreme Court said:

> "The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. *These employments,* when too long pursued, the Legislature has judged *to be detrimental* to the health of employes, *and so long as there are reasonable grounds for believing that this is so,* its decision upon this subject cannot be reviewed by the federal courts. While

[33] Malette vs. City of Spokane, Washington, decided Dec. 31, 1913.

> the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the process of refining or smelting."[34]

By this decision, there was expressly excluded the power, though ostensibly based on the police power of the State to protect health and morals, to enact any regulation of private employment and have it applied to any particular occupation, unless *from the peculiar nature of that occupation itself,* there could be reasonably said to be presented some peculiar hazard to the health or welfare of the employes in question. That question of fact must be determined by a consideration, first, of the nature of the occupation in question; and, second, the nature of the condition of the employes in question, as connected with the particular occupation in question. Neither of these elements alone is sufficiently determinant. The police power cannot be exercised solely because the class of employes in question is composed of men or of women or of minors, either or all. Neither can it be exercised solely because the occupation in question is of one kind or another, either hazardous or non-hazardous.

The exercise of the police power in such cases is to be determined by the nature and extent of the peculiar hazards to health or safety arising out of the connection between the particular class of employes in question with the particular occupation in question.

If, from such connection, standing by itself and independent of other causes or conditions, there does not arise peculiar conditions menacing the health, comfort and safety of the employes, then there is no ground for the exercise of the police power in connection with such occupation.

Without going further, then, it is manifest that even if it be established that a certain employer in a certain

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34 Holden vs. Hardy, 169 U. S., 366.

occupation does not pay a certain employe or a certain class of employes a living wage, by reason of which fact the health, comfort or even morals of the employe is menaced, nevertheless the requisite ground for the interference of the State through its police power is not present. The needs of the employe are absolutely independent of anything that is related to the occupation in question. They are neither created nor increased by reason of any action on the part of the employer or through anything which is peculiar to the particular occupation in question. This is as far as we would need to go. For the fact remains that neither the lack nor the need of a living wage is peculiar to anv particular class of persons, nor to any particular class of employes, whether the class distinction be made on the basis of age, of sex, or of experience. That necessity is individual. It is neither created nor increased bv the fact that the individual suffering from that common need, that natural need, happens to engage himself in a particular occupation as an employe.

There is no ground for the distinction attempted in this minimum wage statute, though confined to women and minors, which warrants its support as a police power measure in furtherance of health and morals.

I am stating these fundamental propositions now because they are suggested by the decisions already cited, and they will be illustrated and confirmed by the decisions which I shall next cite.

The New York Bakery Shop Case.

The Legislature of New York passed a statute limiting the hours of employment in bakeries to ten hours a day. This applied to employes of both sexes. The United States Supreme Court held that act void as not within the police powers of the State, and the Court said:[35]

> *"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state.* There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded

35 Lochner vs. New York, 198 U. S., 45, 56.

power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

"This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? And that question must be answered by the court.

"The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interests of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation

of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours per week. The limitation of the hours of labor does not come within the police power on that ground.

"It is a question of which of two powers or rights shall prevail,—the power of the state to legislate, or the right of the individual to liberty of person and freedom of contract.

"The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid, which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

"This case has caused much diversity of opinion in the state courts. In the Supreme Court two of the five judges composing the court dissented from the judgment affirming the validity of the act. In the Court of Appeals three of the seven judges also dissented from the judgment upholding the statute. Although found in what is called a labor law of the state, the Court of Appeals has upheld the act as one relating to the public health,—in other words, as a health law. One of the judges of the Court of Appeals, in upholding the law, stated that, in his opinion, the regulation in question could not be sustained unless they were able to say, from common knowledge, that working in a bakery and candy factory was an unhealthy employment. The judge held that, while the evidence was not uniform, it still led him to the conclusion that the occupation of a baker or confectioner was unhealthy and tended to result in diseases of the respiratory organs. Three of the judges dissented from that view, and they thought the occupation of a baker was not to such an extent unhealthy as to warrant the interference of the legislature with the liberty of the individual.

"We think the limit of the police power has been reached and passed in this case. *There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid,* and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris,* as employer or employee, to

make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, *there would seem to be no length to which legislation of this nature might not go.* The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in *Holden vs. Hardy,* 169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. Rep. 383, and *Jacobson v. Massachusetts,* 197 U. S. *ante,* 643, 25 Sup. Ct. Rep. 358.

"We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness.

"But are we all, on that account, at the mercy of legislative majorities? A printer, tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. *No trade, no occupation, no mode of earning one's living could escape this all-pervading power,* and the acts of the legislature in limiting the hours of labor in all employments would be valid, *although such limitation might seriously cripple the ability of the laborer to support himself and his family.* In our large cities there are many buildings into which the

sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers and other employees. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers or bank clerks, or others, from contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is, therefore, unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts."

This decision has been vigorously attacked, and it is even asserted that the dissenting opinion in this case "is the law in this country today."[36] But the dissenting opinion in that case did not support or urge any principle which could be the foundation for a statutory minimum wage in private employment. It was based upon the proposition that, as the Legislature of New York had declared, that the *bakery industry was peculiarly dangerous to the health of employes,* the contrary fact was not so well established and well known that an appellate court could say of its own motion that the finding of the Legislature was wrong upon this question of fact, nor that the state appellate court was wrong in refusing to reverse the state legislature as to that finding of fact.[37] But note that in this decision there is emphasized the principle which I have above stated as controlling the consideration of the constitutionality of this minimum wage statute, and my present contention is supported even more by the dissenting opinion than by the main opinion. Taken together, they form a complete

36 Report Massachusetts Commission on Minimum Wage Boards 1912, page 24.
37 Lochner vs. New York, 198 U. S., 45; Dissenting Oponion, 65-74.

confirmation of my proposition, and a complete answer to the claim of constitutionality for this minimum wage statute. They clearly establish the rule that in these matters the hazard to safety, health or comfort of the employe which may be protected by the statutory regulation must be a hazard peculiar to the occupation in question.

A statutory restriction, even as to hours of labor, which had no relation between the occupation affected and the question of the safety, health or morals of the employe, could have no validity based upon the police power of the state. Yet this minimum wage statute applies to any occupation and to each and all occupations, businesses and industries, and to every branch thereof, without any reference or consideration to any peculiarity of any such occupation, much less of any peculiarity with reference to it being hazardous to safety, health or morals. Accordingly, a regulation of hours made in the broad terms of this statute could not be justified; much less a regulation of wages, computed by the living needs of the employe, which are not even remotely connected with, but are absolutely divorced from, anything arising out of the occupation itself.

There is no "real or substantial relation" between the employments affected by such a statute and the objects which it purports to accomplish. In other words, there is no real or substantial relation between the occupation of, for instance, the retail merchant and the natural necessity or the natural desert of an employe to receive a living wage, even though a living wage be necessary for the reasonable health and comfort of the employe. Even if we admit that it is the ethical or religious duty of an employer to supply this need, still there is no legal basis for compelling him to do so, merely because in some occupation he holds to the person in need the relation of employer to employe.

As has been said by the United States Supreme Court many times, and reiterated by the dissenting opinion in the Lochner case, a court should declare such statute invalid if it, though "purporting to have been enacted to protect the public health, the public morals or the public safety, *has no real, substantial relation* to those objects, or is, beyond all question, a plain, palpable invasion of the rights secured by the fundamental

law."[88]

No statutory regulation of labor, whether as to labor conditions, hours or wages which involved a payment or charge upon the employer in favor of the employe has ever been sustained, unless such charge has been to compensate the employe for or to relieve him from some hazard or disadvantage arising directly out of the employment in question. On this principle, hours may be restricted as to employes to whom in the occupation in question longer hours are unhealthy or dangerous. Safe and healthful conditions of work may be required, including safety appliances in machinery. Also, under workmen's compensation acts, casualty from accident in the employment may be insured against at the expense of the employer. It could never be seriously claimed, however, that an employer could be compelled to provide reasonably necessary sick benefits or death benefits for his employe or employe's family, on the ground that such misfortunes occurred directly or indirectly to the employe while employed,—meaning, of course, sickness and death of the employe, or members of his family, which are not results of contact with the employment. Nevertheless, such benefits would be promotive of the health and comfort of the employe and are included in the reasonable necessaries of life. Such benefits cannot be imposed where their necessity does not originate from the employment itself. For the same reason, the minimum wage benefit is entirely different from other statutory benefits to employes, at the expense of the employer, which have been sustained by the courts. The fulfilling of the necessity in question is, as a general proposition, promotive of health, morals and comfort, but it is not a necessity which arises out of the employment, nor one which is connected with it. So far as considerations of legal obligations are concerned, the employer is a stranger to such necessities. Therefore, he cannot be compelled by law to pay a wage based solely upon the living necessities of the employe.

The Oregon Case—Women in Laundries.

The case of *Muller v. Oregon,* 208 U. S., 412, is cited in support of this minimum wage statute for women employes, as

[88] Lochner vs. New York, 198 U. S., Dissenting Opinion, p. 68.

establishing a right of the legislature, under the police power, to have enforced this legislation as to women employes, which, it is demonstrated, under the decisions already cited, could not be enforced as to adult male employes. It is claimed that this case establishes the right to place women as a class under he purview of statutes regulating hours and wages and other conditions; and that such restrictions may be made applicable to any and all occupations independently of the question of any hazard to safety, health or morals peculiar to the occupation in question.

On the contrary, this Oregon case again confirms the proposition upon which my argument is based, that in order to warrant such restrictions, with reference to any occupation, on the ground of police power to protect against hazards to safety or health or morals, the hazard in question must be shown to arise from the occupation in question and in connection with the employment in question. More than that, a restriction as to hours might be justified as having "real, substantial relation" with the purposes of the statute. But a regulation requiring a living wage would have no relation whatever to the occupation or to the employment in question.

The Legislature of Oregon passed an act limiting the hours for work by females "in any mechanical establishment, or factory, or laundry in this state more than ten hours during any day." The question in this case was as to whether the prohibition as applicable to laundries could be enforced.

Now, from what has already been said, and before we proceed to examine the decision of the federal supreme court in this Oregon case, we can readily see that the principles which we have stated, as already drawn from the decisions above noted, would be confirmed or repudiated in the Oregon case according to whether the basis of that decision was one or the other of the following propositions:

(1) The occupation of laundry women, as laundries are generally conducted, involves such requirements of the employe that excessive hours would hazard the safety and health of the employe in question; and, furthermore, as the employes in question are women, the hazard involved is peculiarly dangerous to women; or

(2) Under the police power restrictions may be applied to women employes as a class, irrespective of the character of the occupation or kind of employment in which their work is done, and irrespective of the kind of work which the women employes in question have to do in that occupation, and also irrespective of whether or not the hazard to their safety, health and comfort, against which it is the object of the act to protect them (in the case of the minimum wage statute it is the abstract right to or need of a living, and is not a question of hours) has, in the words of the Court, "any real or substantial relation" to the objects sought to be accomplished.

Now, a reading of that decision shows that it is based exactly upon the former proposition and that it squarely repudiates the latter proposition. The case, therefore, not only fails to support the argument for the constitutionality of the minimum wage statute, but is directly against it.

The Court held that an occupation might be injurious to a woman employe when it was not to a man, and that, therefore, hours of more than ten a day for a woman might be prohibited, if the facts warranted, when such prohibition in the case of a man would not be sustained; and that this distinction, when reasonably made the basis of a statute, would be sustained.

Then, referring to the occupation in question, that of a woman worker in a laundry, requiring her day after day to be for a long time on her feet at work, it was held that the State Legislature was warranted in finding that there was as to women a peculiar hazard to health, if the hours were not restricted. This is the scope and limit of that decision. The Court said:[39]

> "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, respecting this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offsprings, the physical wellbeing of woman becomes an object of public interest and care in order to

39 Muller vs. Oregon, 208 U. S., 412, 421-23.

preserve the strength and vigor of the race.

"Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions — having in view not merely her own health, but the wellbeing of the race — justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous

health upon the future wellbeing of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.

"We have not referred in this discussion to the denial of the elective franchise in the State of Oregon, for while that may disclose a lack of political equality in all things with her brother, that is not of itself decisive. The reason runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.

"For these reasons, and without questioning in any respect the decision in *Lochner v. New York,* we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution, *so far as it respects the work of a female in a laundry,* and the judgment of the Supreme Court of Oregon is affirmed."

THE CASE OF NOBLE STATE BANK V. HASKELL, 219 U. S. 104.

It is now a little over three years since the question of the extent of the police power of the state was discussed by the Federal Supreme Court in the case of *Noble State Bank v. Haskell.* Since then, two sentences, picked out of that decision and disconnected with their context or application, have been quoted as supporting every extreme theory repugnant to the fundamental principles of our constitutional system of government. They have been the solace and plaything of visionaries. They have been put forward as authoritative support, from the highest judicial tribunal, of every political vagary which has been advanced since they were uttered. From them the socialist claims not only justification for his creed, but also a promise of the effective accomplishment of his ends, and this, too, by the instruments by which he has said he would work out those ends; because, under his construction, they would compel all constitutional protection to property to yield to the forces of a "preponderant opinion." The pseudo-reformer who confounds change with progress cites these excerpted sentences as authority in favor of his proposition to do away with all constitutional safeguards and to turn every judge and every judicial decision over to the arbitrary caprice of a temporary majority.

Every possible change in the administration of the law or in our system of government is advanced not only as justifiable, but as feasible and consistent with constitutional law; because, as it is alleged, these excerpts extend the limits of the police power as theretofore established and make the police power of the respective states, without limit, paramount to every other constitutional consideration.

In the same way they are cited by advocates of the constitutionality of the minimum wage statute as involving a new doctrine with regard to the police power in accordance with which all objections to the constitutionality of that statute are overcome.[40]

These sentences are, in the words of Justice Holmes, who wrote the decision:

> "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[41]

I have often thought how Justice Holmes, when he hears the attempted application of these sentences, must yearn to divest himself for a time of his judicial position, which prohibits his answering directly the many distortions and misapplications of these phrases, and to answer personally some of the claims which are made with regard to them. I venture the surmise that already, if we would read between the lines, he has suggested some such answer in his speech less than a year ago when he inveighed against any policy founded upon an unreasonable misapprehension of the significance of free competition in business, of private ownership and of private investments. He said:[42]

> "We are apt to think of ownership as a terminus, not as a gateway; and not to realize that, except the tax levied for personal consumption, large ownership means investment, and investment means the direction of labor toward the production of the greatest returns, returns that so far

40 Report Massachusetts Commission on Minimum Wage Boards, 1912, page 24; and "Minimum Wage Legislation," by John A. Ryan, Catholic World, February, 1913.

41 Noble State Bank vs. Haskell, 219 U. S., page 104, 111.

42 Speech of Mr. Justice Holmes at dinner of the Harvard Law Association of New York, Feb. 15, 1913, S. Doc. No. 1106, 62d Cong., 3d Sess.

as they are great show by that very fact that they are consumed by the many, not alone by the few. If I might ride a hobby for an instant, I should say we need to think things instead of words; to drop ownership, money, etc., and to think of the stream of products, of wheat and cloth and railway travel. When we do, it is obvious that the many consume them; that they now as truly have substantially all there is as if the title were in the United States; that the great body of property is socially administered now; and that the function of private ownership is to divine in advance the equilibrium of social desires which socialism equally would have to divine, but which under the delusion of self-seeking is more poignantly and shrewdly foreseen."

What Justice Holmes said in the Oklahoma Bank case was no new doctrine of the police power, nor a rule extending any former doctrine. As he protests (in his opinion denying reargument):

"The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power."[42a]

In former cases the Supreme Court, speaking through Justice Holmes and through Justice Brewer, had said what was intended to be the same, and to have the same application, as was stated by Justice Holmes in the Oklahoma case. In the Lochner case, Justice Holmes had said:[43]

"A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

"General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I

42a 219 U. S., p. 580.

43 Lochner vs. New York, 198 U. S. 45, 75-6.

think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health."

Again, with reference to the claim that a woman's peculiar physical structure and duties would make an employment in which she is required to stand for long hours hazardous and peculiarly hazardous to her as a woman, Justice Brewer had said:[44]

"The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

The decision in the case of *Muller v. Oregon* expressly confirms the principle and the holding of the both opinions in the case of *Lochner vs. New York*. The decision in the Oklahoma case of *Noble State Bank vs. Haskell* expressly confirms the principle and holding in both these former cases, and in others.

44 Muller vs. Oregon, 208 U. S., 412, 420-1.

There was no new principle and no extension of former principles announced nor intended to be announced in the Oklahoma Bank case. The question there was as to the police power of the State of Oklahoma to regulate banking within the state and to provide guaranties under the authority of the State and under its direction against the insolvency of banks organized, maintained and operated with the sanction and under the authority of the State. It was held that the compulsory assessments, for the purpose of making up the guaranty fund, provided to be paid by the various banking institutions were, under all the circumstances, within the police power of the State.[45]

There is absolutely nothing in that case from which it can be argued that it is within the police power of a State to compel the payment of a minimum wage in connection with employment in any occupation, without distinction as to kind, and especially when the basis of the attempted exercise of the police power is merely a personal need,—having no relation to the occupation or employment itself,—of the employe.

A Legislative Minimum Wage for Private Employment Is Unconstitutional.

Having shown that the authorities cited in support of a legislative minimum wage do not furnish any such support, but rather the contrary, I next cite authorities expressly passing upon minimum wage statutes.

The Legislature of Indiana passed an act prohibiting under penalty any employer engaged upon public work of the state, counties, cities or towns from paying for any unskilled labor less than twenty cents an hour. The Supreme Court of Indiana held the act unconstitutional as infringing the liberty of the citizen, that it was class legislation, and had the effect to deprive the employer of his liberty and property without due process of law, and denied to him the equal protection of the laws. The question in this case was different from that decided in the case of *Atkin vs. Kansas,* 191 U. S., 207. There the only question was the right to legislate *as to hours* of employes

45 Noble State Bank vs. Haskell, 219 U. S., 104.

engaged *in public work,* irrespective of the hazards of the work. This, as we have seen, was decided on grounds independent of any question of police power, but was based solely on the power of the State to legislate as to the terms and conditions under which work for itself,—that is, public work—should be done. The Washington Supreme Court, in the case of *Malette vs. Spokane,* decided December 31, 1913, as we have seen, extended that rule to a minimum wage for laborers employed in public work. The Indiana Supreme Court, however, refused to extend the application of the rule in *Atkin vs. Kansas* to a compulsory minimum wage in public work. It will be for the Supreme Court of the United States to say which of these two state courts has been right in regard to these decisions. The question of the minimum wage even in public work has not yet been decided by the Federal Supreme Court. It is certain that if that court should sustain the Washington decision, or reverse the Indiana decision, it will be on the ground that because the employment involved is public work, there is no question involved as to police power, and this for the same reasons as stated in the case of *Atkin vs. Kansas.* Accordingly, then, though the Federal Supreme Court shall sustain the power of the State to fix a minimum wage in public work, such decision will in no wise support the claim of the right of the State to fix a minimum wage in private employment. On the other hand, if the Federal Supreme Court shall refuse to confirm such power in the State, it will be for the reason that a minimum wage, even for public work, does not come within the power of the State, either as controlling to that extent its own contracts, or under any proper exercise of police power.

The Indiana Supreme Court approached the question as though it stood upon the same ground as would a legislative minimum wage in private employment. We have, therefore, in the decision of the Indiana Supreme Court, the views of the highest court of one of the states with respect to the power of the State to fix the minimum wage in private employment. In deciding that such attempted exercise of power was unconstitutional, and did not come within the proper exercise of the State's police power, the Indiana Court said:[46]

46 Street vs. Varney Electrical Co., 160 Ind., 338.

"If the legislature has the right to fix the minimum rate of wages to be paid for common labor, then it has the power to fix the maximum rate. And if it can regulate the price of labor, it may also regulate the prices of flour, fuel, merchandise, and land. But these are powers which have never been conceded to the legislature, and their exercise by the state would be utterly inconsistent with our ideas of civil liberty. Among the most odious and oppressive laws ever enacted by the English Parliament, in the worst of times, were the statutes of labor of Hen. VI and Edw. III. *These enactments fixed a maximum rate* of wages for the laboring man, prohibited him from seeking employment outside of his own country, required him to work for the first employer who demanded his services, and punished every violation of the statute with severe penalties. In the very nature and constitution of things, *legislation which interferes with the operation of natural and economic laws defeats its own object, and furnishes to those whom it professes to favor few of the advantages expected from its provisions.* The circumstance that the act of March 9, 1901, reverses the conditions of the statutes of labor of Hen. VI and Edw. III, and lays the burden and the penalty upon the employer instead of the laborer, does not render it any less pernicious and objectionable as an invasion of natural and constitutional rights. Statutes similar to this have been before the courts of other states, and in nearly every instance have been held unconstitutional. *People, ex rel., Rodgers v. Coler,* 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716; *State, ex rel., Bramley v. Norton,* 5 Ohio, N. P. 183; *Com. v. Perry,* 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Ramsey v. People,* 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Jones v. Great Southern Fireproof Hotel Co.,* 79 Fed. 477; *State v. Julow,* 129 No. 163, 29 L. R. A. 257, 31 S. W. 781; *Shaver v. Pennsylvania Co.,* 71 Fed. 931; *Atkins v. Randolph,* 31 Vt. 237; *Palmer v. Tingle,* 55 Ohio St. 423, 45 N. E. 313; *Cleveland v. Clements Bros. Constr. Co.,* 67 Ohio St. 197, 59 L. R. A. 775, 65 N. E. 885.

"The statute of March 9, 1901, is obnoxious to the further objection that through its operation a citizen may be deprived of his property without due process of law. If the minimum price to be paid by municipal subdivisions of the state for unskilled labor on public works exceeds the rate at which such labor can be obtained by other persons at the same place, then the excess so paid for labor on public improvements is taken from the citizens assessed for such works, not by due process of law, but by a mere legislative

fiat. The citizens of the state, who must, through assessments made upon their property, pay for the public works of counties, cities, and towns, are entitled to have such work done at such rate of wages as the local agents and official representatives of such municipal subdivisions of the state may be able to secure by contract. They cannot be required arbitrarily to pay higher wages than laborers employed on private works or improvements in their particular district demand, any more than they could be compelled by similar legislation to pay a minimum rate of wages to laborers employed by them in their private business. If the minimum rate fixed by the statutes exceeds the market value of such wages, the excess is a mere donation exacted under color of law from the citizens liable to assessment for the public improvement, and bestowed upon the unskilled laborer. Public revenues cannot be applied in this way. *McClelland v. State,* 138 Ind. 321, 37 N. E. 1089; *State ex rel., Tieman v. Indianapolis,* 69 Ind. 375, 35 Am. Rep. 223; *Warner v. Curran,* 75 Ind. 309.

Lastly, we think the statute obnoxious to the objection of class legislation. In fixing the minimum rate of wages to be paid for unskilled labor to be employed by counties, cities, and towns, on public improvements, a classification is made which is unnatural and unconstitutional. The laboring men of the state may, for some purposes, constitute a class concerning which particular legislation may be proper. This classification has been recognized and sustained in statutes requiring the payment of wages in lawful money of the United States, forbidding the assignment of future and unearned wages, and in similar acts. But no legal and sufficient reason can be assigned for placing unskilled labor in a class by itself for the purpose of fixing by law the minimum rate of wages at which it shall be employed by counties, cities, and towns on their public works. Why exclude the skilled mechanic from the benefits of the act? Why compel the payment of a higher rate of wages to the unskilled laborer than may be demanded by the skilled mechanic for more difficult and important work, requiring special training, experience, and a higher degree of intelligence? Unless the Legislature has the power to fix the minimum rate of wages to be paid by counties, cities, and towns to carpenters, stone masons, brick layers, plumbers, and painters employed on local improvements, treating each trade as a separate class, it has not the power to enact laws fixing the compensation of unskilled laborers employed on similar works. No sufficient reason has been

assigned why the wages of the unskilled laborer should be fixed by law, and maintained at an unalterable rate, regardless of their actual value, and that all other laborers should be left to secure to themselves such compensation for their work as the conditions of supply and demand, competition, personal qualities, energy, skill, and experience may enable them to do.

After the most careful and thorough examination of all the questions of law presented by the demurrer in this case, we are satisfied that the ruling of the lower court was not erroneous, and its judgment is therefore affirmed."

The highest authority on the law of *Master and Servant,* after a consideration of all the modern arguments for and against a minimum wage in private employment, holds that there is no authority or power in a State to establish or enforce such a wage:[47]

"In the American States it would seem that no legislation of this type has ever been enacted, except with respect to public employments. *So far as respects work in which neither the state itself nor any political subdivision thereof is concerned,* there can be no reasonable doubt that, even where the matter is not covered by an explicit provision in an organic law, a restrictive statute would, under the general principles of American constitutional jurisprudence, be treated by the courts as invalid, whatever might be the nature of the business affected."

Judge Cooley, the greatest authority of modern times, on constitutional limitations, says:[48]

"In the early days of the Common Law, it was sometimes thought necessary in order to prevent extortion to interfere by royal proclamation or otherwise, and establish the charges that might be exacted for certain commodities or services. The price of wages was oftener regulated than that of anything else, the local magistrates being generally allowed to exercise authority over the subject. The practice was followed in this country and prevailed to some extent up to the time of independence. Since then it has been commonly supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty."

47 Labatt's Master and Servant, Section 846, page 2285.
48 Cooley's Constitutional Limitations, page 820.

The establishment of the right to regulate prices in a certain public or quasi-public enterprise operated under grants from the State, furnishes no parallel. In such cases, so far as private property is affected, the private property is used under a public grant and for that reason subjected to regulation by the State, including the regulation of rates. The public, through the State, has a certain interest carrying with it the right of control necessary to regulate such rates. Before the adoption of the Fourteenth Amendment, this right in the State was carried to an extreme in fixing maximum charges, and even at arbitrary rates, for all classes of industries. But with reference to such regulations, the Federal Supreme Court has said:[49]

> "Down to the time of the adoption of the Fourteenth Amendment it was not supposed that statutes regulating the use or even the price of the use of private property *necessarily* deprived an owner of his property without due process of law. Under some circumstances they may, but not in all. * * * This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and without its operative effect. Looking then to the common law from whence came the right which the Constitution protects, we find that when private property is affected with a public interest, it ceases to be *juris privati* only. * * * When one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in the use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use.*"

Certainly the occupations of the merchant, wholesale or retail, and other occupations made subject to the minimum wage statutes, are not of the class specified by Judge Cooley as being subject to price regulation, either in the form of minimum wage regulation, or otherwise.

Amendment of a State Constitution Authorizing a Minimum Wave in Private Employment, does not do away with Constitutional Objections.

The constitutional objections here presented to a legislative minimum wage in private employment cannot be avoided by

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49 Munn vs. Illinois, 94 U. S., 125.

mere amendment of the State constitution expressly authorizing the enactment by the State Legislature of such minimum wage. The legislative minimum wage as applied to private employment necessarily restricts the liberty of contract, creates an arbitrary discrimination between one class and another, not only of employers, but also of employes, and compels the employer to contribute, out of his investment and out of his earnings, for the benefit of employes and for their sustenance, as well as for the general public benefit. Such statute, therefore, contravenes the express terms of the Federal Constitution, prohibiting any state from enforcing any law which deprives a citizen of liberty or of property without due process of law, or which denies to any citizen the equal protection of the laws. If such prohibition is also incorporated in a State constitution, a legislative minimum wage statute contravenes both the State and the Federal Constitutions. If the State Constitution is changed so as to permit by terms the minimum wage, that means that its repugnancy to the State constitution is alone removed. The Federal prohibition still remains, and is the supreme law of the land, which it is the duty of all the courts, Federal or State, and a duty imposed upon all State and Federal Judges under express oath, to recognize and to enforce.[50]

These Constitutional obstacles are recognized by all intelligent writers and advocates in favor of the legislative minimum wage in private employment.[51]

The recognition of this constitutional prohibition induced Massachusetts and Nebraska to make their minimum wage statutes non-compulsory. The states of California and Ohio amended their constitutions, either on the theory that such amendments solved the constitutional difficulty presented, or was a necessary step in connection with inserting a minimum wage amendment in the Federal Constitution.

It is safe to assume that neither the "due process of law" clause, nor the "equal protection of the laws" clause will be eliminated by amendment from the Federal Constitution. Such amendment, however, would be necessary in order to permit a

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50 Article VI, United States Constitution.

51 "A Living Wage," by John A. Ryan, page 313. Also, Annals American Academy Political and Social Science, July, 1913: "The Minimum Wage as a Legislative Proposal in the United States," by Prof. Lindsay, pages 45, 48; and "The Minimum Wage in Great Britain and Australia," by Prof. Hammond, 22, 25.

legislative minimum wage statute in any state, unless a specific amendment to the Federal Constitution be made, expressly permitting a State to enact a minimum wage. Without such amendment, it avails nothing to amend a State constitution; for the Federal prohibition against legislation by the states applies to State constitutions, as well as to State statutes. The question of repugnancy to Federal limitation is determined by the question whether a State statute or a State constitutional provision, one or both, when enforced, has the effect to contravene the prohibitions of the Federal Constitution. In case of such contravention, a State Constitutional provision, as well as a State statute, must be held void.[52]

As stated by the United States Supreme Court:

> "Upon the adoption of the Fourteenth Amendment, *whatever their own constitutions may have been, or have subsequently declared*—the states became bound, as was the United States by the Fifth Amendment, not to deprive any person of property without due process of law."[53]

But there are special features of the Minnesota statute which make it further obnoxious to constitutional objection. Some of these are next discussed.

The Minnesota Statute Provides For No Hearing For The Employer Affected.

One of the established requisites of a decree or order compulsory against a person, with a penalty for a breach, is that, in order that such decree or order shall be binding upon him, he shall have the opportunity of a proper hearing upon notice, and an adjudication in proceedings to which he is a party. The Minnesota statute in question in substance gives to the Commission power to promulgate and have enforced its order establishing a minimum wage for any particular employer by a course of proceedings to which such employer is a stranger. The only provision for hearing or notice to the employer is (Sec. 6) that after the final order is promulgated, "a copy of such order shall be mailed, so far as practicable, to each em-

52 Bigelow vs. Draper, 6 N. D., 152.
53 S. W. Oil Co. vs. Texas, 217 U. S., 114, 119.

ployer affected," and "filed with the Commissioner of Labor." Nevertheless, whether the employer receives such notice, or not, he is subject, if he does not comply with the order, to both criminal and civil prosecution.

More than that, there is no provision, even subsequent to the promulgation of such order, for the employer to have determined the question of legality or of reasonableness of the wage rate established.

It would not seem necessary to argue that such provisions, independent of all other questions, would fail to constitute due process of law.

The situation is entirely different from that of a legislative commission establishing rates at which a common carrier must do business for the public. In the present case, a commission presumes to establish a compulsory payment, not to, but by, a private employer. That payment is of the nature of an assessment against an individual *in invitum*, the amount of which is determined by the commission. In such cases the individual bound to pay the assessment must be a party to the proceedings by which its amount is determined. Otherwise, he cannot be compelled to pay. This rule has been established by the Federal Supreme Court.[54]

THE STATUTE IS VOID, BECAUSE IT MAKES THE ORDER OF THE COMMISSION FINAL WITHOUT THE RIGHT TO REVIEW BY THE COURTS.

Even in the case of statutes authorizing Commissions to fix the rates of public service corporations, such statutes are void, if the order of the Commission is made final, without review. Such is the holding of the Federal Supreme Court in the case of a Minnesota Statute giving the State Railway and Warehouse Commission power to fix railroad rates of a common carrier with no power of review on application of the carrier. Referring to the statute, the Court said:[55]

> "It conflicts with the Constitution of the United States in the particulars complained of by the railway company.

54 Central of Georgia Ry. Co. vs. Wright, 207 U. S., 127.
55 Chicago, etc., Ry. Co., vs. Minnesota, 134 U. S., 459.

It deprives the company of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy and constitutes therefore as an absolute finality, the action of a railroad commission, which in view of the powers conceded to it by the state court cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. * * * The question of the reasonableness of a rate or charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and insofar as it is thus deprived where other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the law."

THE STATUTE DELEGATES LEGISLATIVE POWER.

The Commission is empowered to establish a minimum wage rate on a basis which is in effect simply the arbitrary dictum of the Commission. There is no reasonable or tangible fixed basis of computation by which the Commission is bound. The provision that such minimum wage shall be a living wage, and that that shall mean a wage "sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life," does not furnish the definiteness of a basis for computation, requisite to avoid the objection here made.

Such delegation of power without definite provisions as to its exercise, is void. On this ground the Minnesota Supreme Court decided that a delegation of power to the State Insurance Commissioner to dictate a standard form of insurance policy, conforming to the New York Standard Policy "as near as the same can be made applicable," was void.[56] The basis of the objection

56 Anderson vs. Manchester Fire Assurance Co., 59 Minn., 182.

to the delegation of such legislative power is stated in a recent Wisconsin case where the court said:[57]

> "The result of all the cases on this subject is that a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointees or delegate of the legislature, so that, in form and substance, it is a law, in all its details, *in praesenti*, but which may be left to take effect *in futuro* ,if necessary, upon the ascertainment of any prescribed fact or event. Instead of preparing a form of standard policy, and adjusting it to the existing legislation, or modifying such legislation, if necessary, by virtue of its constitutional functions, the legislature delivered over this task wholly to the insurance commissioner, to accomplish it as nearly as might be; and this depended wholly upon his discretion and judgment as to what the law should be in this respect, for the act had not specifically declared it. Conceding that the legislature must have adopted the New York form as an entirety, by the use of general language, it is evident that the proposed form, to conform 'as near as can be to the form adopted in New York,' involved a duty equivalent to that of revision, which it cannot be contended can be delegated except to legislative approval. While the commissioner, within the discretion intrusted to him, might have approximated, in a great degree, to the policy which the legislature may have intended, the objection, in view of the consideration stated, that it has not received the legislative sanction, is necessarily fatal to it. * * * For these reasons, we hold that the provision authorizing the insurance commissioner to prepare, approve, and adopt a printed form, in blank, of a contract or policy of fire insurance, together with such provisions, agreements, or conditions, as may be endorsed thereon or added thereto, and form a part of such contract or policy, and that such form shall, as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy, so called and known, is unconstitutional and void."

Now, this minimum wage statute fixes no standard by which it can be determined what is a necessary comfort, nor what are the "conditions of reasonable life," nor what is "sufficient to maintain the worker in health." What is necessary for one person, is not necessary for another. Standards of living are

57 Dowling vs. Lancashire Ins. Co., 92 Wis., 63.

recognized to be different. The determination of the wage rests entirely in the discretion of the Commission. So far as such discretion is required, it is a legislative discretion, and such discretion cannot be delegated.

THE STATUTE CREATES DISCRIMINATION (1) BETWEEN EMPLOYERS OF THE SAME CLASS; (2) BETWEEN EMPLOYES OF THE SAME CLASS; (3) RESTRICTS THE LIBERTY OF CONTRACT; AND (4) HAS THE EFFECT TO TAKE THE PROPERTY OF THE EMPLOYER FOR THE BENEFIT OF OTHERS,—ALL CONTRARY TO CONSTITUTIONAL PROHIBITIONS.

It is not necessary to argue further in detail that the statute has all the effects just enumerated. Such effect of the statute is assumed by all who argue in favor of its constitutionality, and who, therefore, base the power of the State to make and enforce such statute on the police power, the exercise of which in proper cases, it is recognized, may have the effect, indirectly or in some instances directly, to conflict with private personal or property rights.

It should be kept in mind, however, that these discriminations and damage to personal and property rights, arising out of the enforcement of such a law, are not merely theoretical but are serious and may be disastrous to the business or industry affected.

As already shown, the enforcement of such a statute, by raising the normal expense account of the employer affected, creates a discrimination against him and in favor of other employers in the same occupation, situated not only in other localities of the State, if the rates fixed vary in different localities, but also in favor of his competitors located outside of the state where no such law, or where a different rate under a similar law, is enforced. There results a tendency to depress an industry in one locality as against a similar industry in other localities, or in one state as against similar industries in another state. The depression may be only to the extent of a diminution of profits. But it may, and in many cases probably would, extend to an entire deprivation of profits, and therefore the closing out of the business or industry affected. Employers whose expenses are thus increased cannot re-

coup themselves by a rise in prices, because of competition in localities where business is not similarly affected. If such difficulties were overcome by a uniform minimum wage law, coextensive with the markets controlling the prices of the product in question, then the cost of living tends to increase and at the same time, of course, the standard by which the minimum wage is computed also rises, with no resultant benefit to the wage earner. An arbitrary discrimination is also created between the employes themselves, without any legal basis for the distinction made in the classes of employes, in the application to labor of the minimum wage.

As we have seen, there can, under the Minnesota statute, be given no consideration to the experience, capacity or ability of the different employes to whom the minimum wage is applied. The basis of computation must be the same for all classes, and the standard of living must be taken as the same for all. No allowance can be made for the value to the employe of the opportunity for practical instruction; he is deprived of any wage until he shall reach the efficiency measured by the wage fixed. As we have seen, also, the result in any occupation will be to eliminate from employment all those whose efficiency is not proportionate to the minimum wage; for no employer can be compelled, and could not be expected, especially under vain threats of enforcing compulsion, to pay for labor more than it is worth.

As we have already seen, another resulting tendency is to make the minimum wage established also the maximum wage. At the same time that lower wages are artificially and by compulsion brought up to a minimum standard, the inevitable result is to make the wages above the minimum to remain stationary, or to be diminished to or towards the minimum. Such difficulty can be obviated only by the fixing of wages for all classes of labor, both minimum wages, and those above the minimum. This, of course, cannot be accomplished by legislative enactment; although it has been done in certain occupations through the co-operative agency of trades unionism. The legislative minimum wage is antagonistic to trades unionism, and by that I mean to the features of trade unionism which are generally recognized as proper and efficient.

It is obvious, without further argument, that the well recognized personal privilege and liberty of contract, both of employe and employer, are diminished by the enforcement of the minimum wage statute. The resulting disadvantages are altogether, I believe, to the employe, more than to the employer; but the fact that the employer is thereby prejudiced is sufficient to require a holding by the courts that the statute is void, unless it can be held as a proper exercise of the police power.

Manifestly, the enforcement of such statute has the effect to compel the private employer to contribute money for the benefit of others, whether these others be regarded as individuals or the general public. It results in an arbitrary assessment upon the employer for the benefit of others.

This, and other effects of the law, including those already discussed, make it repugnant to constitutional prohibitions; because no theory of the police power can warrant its enforcement by the courts. This lack of warrant for claiming the power to enact and enforce this sort of legislation has already been shown.

CONCLUSION.

There is no attempt in this discussion to contravert the theory advanced upon an ethical basis, that every employe has, as a part of his generic right to exist as a person, the natural and moral right to be furnished with sufficient sustenance to maintain life and to maintain him in health and reasonable comfort. This, however, is far from admitting that that natural right of his to receive either proves, or tends to prove, a corresponding duty on the part of one who happens to be his employer to furnish all that sustenance and means for life, health and comfort, or any part of it, except in so far as healthful and comfortable conditions of work, while employed, are concerned.

The forces of the inexorable law of supply and demand and of other natural economic laws, cannot with impunity be defied by the legislative fiat of man. Relief from their effects may be achieved, and to a large decree they may be overcome, by co-operative organization. Such co-operation may be promoted by proper constitutional measures; but the efficacy of any

legislative enactment relating to a minimum wage is not so much from its compulsory features as it is from its encouragement and assistance to the co-operation of those more benevolently inclined or having a higher ethical sense. For this reason, the non-compulsory statutes of Massachusetts and Nebraska are based upon a scientific theory and consistent with and promotive of practical benefit for the classes who are intended as the beneficiaries of such legislation.

A compulsory legislative minimum wage necessarily results in such disarrangement of the conditions of labor, trade, commerce and industry, that the evils resulting require greater remedial agencies for reform than are comprised in any reform attempted through the minimum wage itself. The State has no right to inject such disturbing elements as the compulsory minimum wage into the social and industrial life of its citizens, unless and until it has provided in advance the remedies for the resulting evils. It must provide for the army of lower wage earners who are thereby rendered job-less. It must provide special education for the occupations to which the minimum wage is to be applied. It must raise and maintain the lower class of laborers to the standard of efficiency established by the minimum wage. It must prevent, by stricter immigration laws, the influx into the labor markets of this nation of a continuous stream of incompetents. Until such immigration restrictions are established, no remedy for the evil conditions resulting from the legislative defiance of the natural law of supply and demand, can be adequately provided.

The compulsory legislative minimum wage, particularly as contemplated by the Minnesota statute of 1913, is not only inadvisable, because it is impracticable and unworkable, and because it is inimical to the interests of both employes and employers; but it is also unconstitutional and cannot be enforced against those employers who do not choose voluntarily to submit to the proceedings taken under it.

The police power of the State is not a sufficient basis for such legislation. The regulation of hours or even of wages in public work has no relation to the question, because such regulations are supported upon a basis entirely apart from that of the police power. The decisions sustaining those restrictions upon

private employment which have been sustained in the case of particular employments in connection with particular classes of employes, with the distinction between employments which are hazardous and those which are not, and the distinction as to those which are hazardous to women, although perhaps not to other classes,—all these decisions show that the legislative minimum wage in private employment cannot be based upon the police power.

As already pointed out, the need of the employe in question, which it made the duty of the employer to supply, is a need which does not arise out of the occupation in question, nor out of the connection of the employe in question with that occupation. It is a need which exists independently of the occupation; because the need of an income sufficient to sustain life in health and comfort is a personal need, and not a need arising from the capacity of employe. Even if we assume that there is a natural moral right to have that need supplied, still, the duty to supply it does not rest and cannot be made to rest, as a legal duty, upon the employer.

There are, therefore, lacking the elements upon which to base any such legislation. While the subjects of health, morals, comfort, and general social welfare, are generally speaking the subjects out of which arise the right of the State to exercise its police power in legislation, nevertheless, as has already been shown, the mere insertion in an act of the statement that its purpose is to promote health, morals or comfort, or any other elements of social welfare, does not make the act within the police power of the State. Neither does the mere fact suffice that the results obtained by the act would, in themselves, be promotive of the health, morals or comfort of the beneficiaries for whose advantage the act is intended. In order to impose upon a particular occupation or a particular employer the compulsory burden of contributing, either directly or indirectly, to his employe, whether by concessions or by cash payments, for providing for his health, morals or comfort, it must appear that the object sought to be accomplished by the act has some "real, substantial relation" to the occupation of the employer in question or to the employment in question. There is no such source or relation in the case now under discussion; for the need which is to be supplied does not arise from or in connection

with the employment. The fact of employment, therefore, cannot be made the basis of compelling the employer to supply that need.

From the viewpoint of practicability, the Minnesota Minimum Wage Statute is unworkable. From the viewpoint of public policy, it is inexpedient. From the viewpoint of the law, it is unconstitutional and unenforcible.[58]

ROME G. BROWN.

Minneapolis, Minnesota,
February 2, 1914.

58 Since the above was written, the Oregon supreme court has upheld the Oregon Minimum Wage Statute in the case of Frank C. Stettler, Apellant, vs. Edwin V. O'Hara, et al, Respondents, decided March 17, 1914, reported, 139 Pacific Reporter, 743. The basis of the decision is, that in view of a quite extensively expressed "common belief" by certain writers upon social questions, although not directly confirmed by any adjudicated case, "the court cannot say, beyond all question, that the Act is a plain, palpable invasion of rights secured by the fundamental law and has no real or substantial relation to the protection of public health, public morals or public welfare." Therefore, viewing the claim of unconstitutionality as one which is not doubtful "beyond all question," the Oregon court, by holding in favor of constitutionality, permits a review of the question by the Federal supreme court, which review would not be possible in this case if the decision of the Oregon court had been otherwise. This decision shows that the Oregon supreme court overlooked or ignored the distinction, shown in the foregoing discussion, between statutes regulating hours in private employment in order to prevent hazards to the employee arising out of the peculiar nature of the employment, and statutes enacted to supply needs or to prevent hazards which are purely personal to the employee and which do not arise out of or in connection with the employment in question. The failure to observe this distinction is to ignore the distinction between a proper and improper application of the legislative police power. Indeed the Oregon decision is based upon the statement, shown in the above discussion to be erroneous, that "every argument put forward to sustain the maximum hours law or upon which it was established applies equally in favor of the constitutionality of the minimum wage law."

APPENDIX.

I.

THE MINNESOTA STATUTE, CHAP. 547, GENL. LAWS, 1913.

An Act to establish a minimum wage commission, and to provide for the determination and establishment of minimum wages for women and minors.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. There is hereby established a commission to be known as the minimum wage commission. It shall consist of three persons, one of whom shall be the commissioner of labor who shall be the chairman of the commission, the governor shall appoint two others, one of whom shall be an employer of women, and the third shall be a woman, who shall act as secretary of the commission. The first appointments shall be made within sixty days after the passage of this act for a term ending January 1, 1915. Beginning with the year 1915 the appointments shall be for two years from the first day of January and until their successors qualify. Any vacancy that may occur shall be filled in like manner for the unexpired portion of the term.

Sec. 2. The commission may at its discretion investigate the wages paid to women and minors in any occupation in the state. At the request of not less than one hundred persons engaged in any occupation in which women and minors are employed, the commission shall forthwith make such investigation as herein provided.

Sec. 3. Every employer of women and minors shall keep a register of the names and addresses of and wages paid to all women and minors employed by him, together with number of hours that they are employed per day or per week; and every such employer shall on request permit the commission or any of its members or agents to inspect such register.

Sec. 4. The commission shall specify times to hold public hearings at which employers, employes, or other interested persons may appear and give testimony as to wages, profits and other pertinent conditions of the occupation or industry. The commission or any member thereof shall have power to subpoena witnesses, to administer oaths, and to compel the production of books, papers, and other evidence. Witnesses subpoenaed by the commission may be allowed such compensation for travel and attendance as the commission may deem reasonable, to an amount not exceeding the usual mileage and per diem allowed by our courts in civil cases.

Sec. 5. If after investigation of any occupation the commission is of opinion that the wages paid to one-sixth or more of the women or minors employed therein are less than living wages, the commission shall forthwith proceed to establish legal minimum rates of wages for said occupation, as hereinafter described and provided.

Sec. 6. The commission shall determine the minimum wages sufficient for living wages for women and minors of ordinary ability, and also the minimum wages sufficient for living wages for learners and apprentices. The commission shall then issue an order, to be effective thirty days thereafter, making the wages thus determined the minimum wages in said occupation throughout the state, or within any area of the state if differences in the cost of living warrant this restriction. A copy of said order shall be mailed, so far as practicable, to each employer affected; and each such employer shall be required to post such a reasonable number of copies as the commission may determine in each building or other work place in which affected workers are employed. The original order shall be filed with the commissioner of labor.

Sec. 7. The commission may at its discretion establish in any occupation an advisory board which shall serve without pay, consisting of not less than three nor more than ten persons representing employers, and an equal number of persons representing the workers in said occupation, and of one or more disinterested persons appointed by the commission to represent the public; but the number of representatives of the public shall not exceed the number of representatives of either of the other parties. At least one-fifth of the membership of any advisory board shall be composed of women, and at least one of the representatives of the public shall be a woman. The commission shall make rules and regulations governing the selection of members and the modes of procedure of the advisory boards, and shall exercise exclusive jurisdiction over all questions arising with reference to the validity of the procedure and determination of said boards. Provided: that the selection of members representing employers and employes shall be, so far as practicable, through election by employers and employes respectively.

Sec. 8. Each advisory board shall have the same power as the commission to subpoena witnesses, administer oaths, and compel the production of books, papers, and other evidence. Witnesses subpoenaed by an advisory board shall be allowed

the same compensation as when subpoenaed by the commission. Each advisory board shall recommend to the commission an estimate of the minimum wages, whether by time rate or by piece rate, sufficient for living wages for women and minors of ordinary ability, and an estimate of the minimum wages sufficient for living wages for learners and apprentices. A majority of the entire membership of an advisory board shall be necessary and sufficient to recommend wage estimates to the commission.

Sec. 9. Upon receipt of such estimates of wages from an advisory board, the commission shall review the same, and if it approves them shall make them the minimum wages in said occupation, as provided in section 6. Such wages shall be regarded as determined by the commission itself and the order of the commission putting them into effect shall have the same force and authority as though the wages were determined without the assistance of an advisory board.

Sec. 10. All rates of wages ordered by the commission shall remain in force until new rates are determined and established by the commission. At the request of approximately one-fourth of the employers or employes in an occupation, the commission must reconsider the rates already established therein and may, if it sees fit, order new rates of minimum wages for said occupation. The commission may likewise reconsider old rates and order new minimum rates on its own initiative.

Sec. 11. For any occupation in which a minimum time rate of wages only has been ordered the commission may issue to a woman physically defective a special license authoring her employment at a wage less than the general minimum ordered in said occupation; and the commission may fix a special wage for such person. Provided: that the number of such persons shall not exceed one-tenth of the whole number of workers in any establishment.

Sec. 12. Every employer in any occupation is hereby prohibited from employing any worker at less than the living wage or minimum wage as defined in this act and determined in an order of the commission; and it shall be unlawful for any employer to employ any worker at less than said living or minimum wage.

Sec. 13. It shall likewise be unlawful for any employer to discharge or in any manner discriminate against any employe because such employe has testified, or is about to testify, or because such employer believes that said employe is about to testify, in any investigation or proceeding relative to the enforce-

ment of this act.

Sec. 14. Any worker who receives less than the minimum wage ordered by the commission shall be entitled to recover in civil action the full amount due as measured by said order of the commission, together with costs and attorney's fees to be fixed by the court, notwithstanding any agreement to work for a lesser wage.

Sec. 15. The commission shall enforce the provisions of this act, and determine all questions arising thereunder, except as otherwise herein provided.

Sec. 16. The commission shall biennially make a report of its work to the governor and the state legislature, and such reports shall be printed and distributed as in the case of other executive documents.

Sec. 17. The members of the commission shall be reimbursed for traveling and other necessary expenses incurred in the performance of their duties on the commission. The woman member shall receive a salary of eighteen hundred dollars annually for her work as secretary. All claims of the commission for expenses necessarily incurred in the administration of this act, but not exceeding the annual appropriation hereinafter provided, shall be presented to the state auditor for payment by warrant upon the state treasurer.

Sec. 18. There is appropriated out of any money in the state treasury not otherwise appropriated for the fiscal year ending July 31, 1914, the sum of five thousand dollars ($5,000.00), and for the fiscal year ending July 31, 1915, the sum of five thousand dollars ($5,000.00).

Sec. 19. Any employer violating any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished for each offense by a fine of not less than ten nor more than fifty dollars or by imprisonment for not less than ten nor more than sixty days.

Sec. 20. Throughout this act the following words and phrases as used herein shall be considered to have the following meanings respectively, unless the context clearly indicates a different meaning in the connection used:

(1) The terms "living wages" or "living" wages" shall mean wages sufficient to main the worker in health and supply him with the necessary comforts and conditions of reasonable life; and where the words "minimum wage" or "minimum wages" are used in this act, the same shall be deemed to have the same meaning as "living wage" or "living wages."

(2) The terms "rate" or "rates" shall mean rate or rates of wages.

(3) The term "commission" shall mean the minimum wage commission.

(4) The term "woman" shall mean a person of the female sex eighteen years of age or over.

(5) The term "minor" shall mean a male person under the age of twenty-one years, or a female person under the age of eighteen years.

(6) The terms "learner" and "apprentice" may mean either a woman or a minor.

(7) The terms "worker" or "employe" may mean a woman, a minor, a learner, or an apprentice, who is employed for wages.

(8) The term "occupation" shall mean any business, industry, trade, or branch of a trade in which woman or minors are employed.

Sec. 20. This act shall take effect and be in force from and after its passage.

Approved April 26, 1913.

II.

Resolution of Minnesota Advisory Board Requesting Answers to Certain Questions.

Whereas, it is not entirely clear what powers and duties of the Commission or ourselves as an advisory board have, or by what methods we shall proceed, in the matter of fixing a living wage, and it is advisable in order that time may be saved and we may do our work speedily and to the best advantage that we be advised upon those matters at once;

Now, therefore, be it resolved that we request the Commission to submit the following questions to the Attorney General for his answer in writing so that we may have them before us for our guidance in our work.

1. Must not the Commission fix a minimum wage in the "Occupation" for the entire state at one time? In other words, can the Commission investigate the minimum wage in any "Occupation" and act upon it within a district less in extent than the entire state? It is claimed by some that the action of the Commission must be with reference to and for the entire state, though in fixing the actual minimum it may vary the minimum in different parts of the state; but though the minimum may differ in various parts of the state they must all be fixed at the same time and as part of the same investigation and proceeding.

2. Section 5 provides that the Commission shall establish a minimum rate of wages for an "Occupation," if, after careful investigation, the Commission is of opinion the wages paid to one-sixth or more of the women or minors employed therein are less than living wages. Can the Commission fix a minimum wage unless upon such investigation they find that at least one-sixth of the women or minors employed in the "Occupation" within the state are receiving less than living wages? Must they find that one-sixth or more of the women are receiving less than living wages before they can fix minimum wages for women, and that one-sixth or more of the minors employed in the "Occupation" throughout the state are receiving less than living wages before they can fix the minimum wage for minors? Or, can they consider women and minors as belonging to the same class and fix minimum wages for each if they find one-sixth of the aggregate number of women and minors are receiving less than living wages?

Must the Commission fix a minimum for both women and minors in the "Occupation," if they fix a minimum for either?

Can the minimum fixed for women differ in amount from that fixed for minors in the same "Occupation," and, if so, on what basis must the difference be fixed? Can the Commission fix a different minimum for male and female minors in the same "Occupation"?

3. What is an apprentice or learner? By what rule shall the Commission determine what is an apprentice, and what is a learner? Must the minimum for apprentices be the same as for ordinary workers? If not, on what basis must the Commission fix the minimum for apprentices, if the cost of living is to determine the wage?

4. Must the Commission make the minimum apply to all classes without regard to the necessity of the class or of the individual in the class? By what rule, if any, is the Commission to determine what is necessary to maintain the worker in health, and what are the necessary comforts and conditions of reasonable life?

Can the minimum wage be varied or fixed, having in mind the ability of the employer to pay the wage, and having in mind the necessity of the employe to contribute to the support of a family or others dependent?

Must not the wage be fixed solely with reference to the actual needs of the employe of ordinary ability for a decent livelihood for the employe alone, without allowing anything to enable the employe to contribute to the support of a dependent, and with-

out allowing anything for education or amusement or for clothing or housing beyond that which will afford a minimum of comfort and amusement?

Can the Commission in fixing a minimum wage allow anything off or in reduction because of the advantages, educational or otherwise, which the employe gets from the particular employment?

5. In case the Commission should promulgate a wage rate which was unsatisfactory to some employer or employers, could the employer so objecting be compelled to comply? Would a rate fixed by the Commission in the manner provided by the Minnesota Minimum Wage Statute be enforcible? May we not expect that the court would hold it unenforcible?

This last question is suggested because it certainly is important in determining how far the Commission should attempt to go. It also bears on the question of the advisability of organizing an advisory board, and would also weigh with any person who was considering accepting a position as a member of the advisory board. It would be very embarrassing to go through all the formalities of fixing a wage rate under the statute and then have it declared that there was no power to fix such rate, and no power to enforce it. Such result would also be prejudicial to the final accomplishment of the meritorious object of bringing about a proper wage adjustment.

III.

Minimum Wage Statutes In Other States.

Massachusetts: (Chapter 706, Acts 1912 as amended by Chapters 330 and 673, Acts 1913).

Wage commission, 3 persons. Duty to enquire into wages of female employes in any occupation in the State if Commission has reason to believe that wages paid substantial number of such employes are inadequate "to supply the necessary cost of living and to maintain the workers in health."

May establish Wage Board as to any occupation; which shall determine the minimum wage, whether by time rate or piece rate, suitable for a female employe of ordinary ability in the occupation in question and also minimum wage for learners and apprentices and for minors below 18 years. Wage Board reports to Commission. If Commission approves, then hearing to employer on 14 days' notice. After such hearing Commission may finally approve and enter decree noting the names of employers who fail or refuse to accept such minimum wage.

Afterwards if it wishes Commission may publish the names of employers from time to time whom it finds are refusing to follow the recommendation. But employer may file declaration in court asking for review of recommendation by Commission; and if employer sustained, then publication of his name is prohibited.

The only penalty is for discharge of employe for testifying in connection with minimum wage hearing. In case recommendation is by less than two-thirds of a Wage Board the Commission reports the recommendation to the general court. Special licenses provided for.

Commission itself enquires into wages for minors and determins wages with proceedings same as on recommendation by Wage Board for women. Every employer keeps a register. Newspapers compelled to publish at regular rates. No libel action except for willful misrepresentation.

Nebraska (Chapter 211, Laws 1913):

Provisions substantially the same as in Massachusetts except that hearing to employer before Wage Board is on 30 days' notice and Commission shall within thirty days after final approval after hearing, publish name of delinquent employers.

Oregon (Chapter 62, Laws of 1913):

Commission, 3 members. Duty to fix (a) standard hours of employment for women or minors in any occupation, (b) conditions of labor for women and minors, (c) minimum wage for women in any occupation, necessary "to supply the necessary cost of living and maintain them in good health" and (d) minimum wage for minors "unreasonably low for such minor workers."

Commission may hold public hearings for preliminary investigation and after such investigation if it is of the opinion that any substantial number of women workers in any occupation are working for unreasonable hours or bad conditions or inadequate wages, the Commission may call a Conference which will enquire into the matter and submit its report to the Commission with recommendation. It may recommend minimum wage for women workers of average, ordinary ability, sufficient to supply the necessary cost of living and maintain them in health and may also recommend minimum wages for learners and apprentices which shall be less than that for regular women workers.

On report from the Conference, the Commission review, the same and if it approves it shall then publish a notice not less than once a week for four successive weeks in two newspapers of general circulation, of hearing for people interested; and

after hearing it may make such order as it deems necessary to carry into effect the recommendation, which order becomes effective sixty days after it is made, and afterwards it is unlawful for employers to disregard such order. Special licenses allowed.

Commission itself may enquire into wages for minors and may issue its order after notice and hearing, as for women workers, which order is compulsory on employers. Commission authorized to make different orders for same occupation in different parts of the state when it deems conditions justify it. All orders of the Commission, except on questions of fact, appealable to the Circuit Court for Multnomah County and from that court to the State Supreme Court. The penalty on employer $25 to $100 or imprisonment 10 days to 3 months, or both. Penalty for discharging employe for testifying. Employe may recover excess.

Washington (Chapter 174, Laws 1913):

Prohibits employment of women workers "at wages which are not adequate for their maintenance." Creates Commission to establish wages for women workers and minors "as shall be held to be reasonable and not detrimental to health and morals and which shall be sufficient for the decent maintenance of women."

A minor is a person of either sex under 18 years. Commission may hold public hearings on notice; and if after such investigation they find wages of female employes in any occupation inadequate to supply them necessary cost of living and to maintain workers in health, then they call a Conference which may investigate and make recommendations to Commission.

Commission reviews such recommendations, may approve them, and after such approval issue an obligatory order effective in sixty days or longer. After such order it is unlawful for any employer in such occupation to employ women over 18 years of age for less than the rate of wages fixed. Special licenses allowed.

Commission itself determines wages "suitable for minors" and may issue its obligatory order as for women and after such issuance of such order it is unlawful for employer to employ minor for less than the wage fixed. Penalty to employer who discharges for testifying and for violation of commission orders, penalty $25 to $100; and employe may recover difference. No appeal from decision of commission upon question of fact but right of appeal to either employer or employe on questions of law.

Colorado (Chapter 110, Laws of 1913):

State Wage Board, 3 members, to enquire into wages to female employes above 18 years in any mercantile, manufacturing, laundry, hotel, restaurant, telephone or telegraph business to enquire whether wages are "inadequate to supply the necessary cost of living, maintain them in health and supply the necessary comforts of life." After inquiry the Wage Board may fix the minimum wage, when agreed to by two members of the Board. Then the Board gives thirty days' notice for hearing in the locality of the industry affected, by publication in newspaper and mailing copy to the employer affected. After such public hearing the Board may issue obligatory order to be effective 60 days from the date of order; and afterwards it is unlawful for any employer to fail to comply with the order, which order is to be published and served personally.

Any employer affected may appeal to the courts on the ground that the order is unlawful or unreasonable, but the evidence considered on such appeal is confined to the evidence presented to the Board in the case from the decision in which the appeal is taken. Further appeal allowed to the Supreme Court. Penalty to employer for not complying with order is fine not to exceed $100 or imprisonment not more than 3 months, or both. Penalty for discharging employe; and employe may recover difference. Special licenses provided for.

Wisconsin (Sections 1729, s—1 to 12, Statutes 1913; Chapter 712, Laws 1913):

Wages less than living wage to any female or minor employe prohibited. "Living wage" defined to mean compensation by time or piece work or otherwise "sufficient to enable the employe receiving it to maintain himself or herself under conditions consistent with his or her welfare."

The Industrial Commission, already established, given jurisdiction to investigate, ascertain, determine and fix living wage pursuant to Sections 2394-41, etc., relating to industrial commission, providing that Commission may investigate upon notice and hearing and promulgate orders. But on petition of employer Commission shall allow special hearing on the reasonableness of any order, which hearing shall be had; and afterwards any order of the Commission is subject to review by application of employer to court against the Commission as defendant to vacate and set aside order; which action is brought by complaint with summons with power of injunction on hearing, with power of court to review or re-submit to the Commission. Penalty to employer not less than $10 nor more than $100 for each failure to comply with Commission's orders, each

day's fault to constitute offense.

Commission may establish Advisory Board. Provisions as to minors who shall have no trade, etc. Commission may grant special licenses to employe unable to earn the wage, permitting such employe to work for a wage stated which is commensorate with his or her ability. No such licensee shall be employed at less than the wage fixed.

Ohio (Constitutional Amendment, adopted Sept. 3, 1912):

Amended constitution by adding articles providing that "laws may be passed fixing and regulating hours of labor, establishing a minimum wage and providing for comfort, health, safety and general welfare of all employes," etc.

Utah (Chapter 63, Laws of 1913):

Makes it unlawful for any regular employer of female workers to pay any women less than the wage herein specified, to-wit: Minors under 18 years not less than .75c per day; adult learners and apprentices not less than .90c per day (1 year constitutes apprentice period); for adults who are experienced in the work they are employed to perform, not less than $1.25 per day.

Regular employers of female workers shall give certificate of apprenticeship, for time served by apprentices. Any regular employer of female workers paying less than the wage specified guilty of misdemeanor.

California (Chapter 324, Statutes 1913):

Commission of 5 members with duty to ascertain wages, hours and conditions of labor, etc., in various occupations in which women and minors are employed. If, after investigation (statewide), wages of women and minors found inadequate to supply the cost of proper living in any occupation, Commission may call a conference, that is, "Wage Board," whose deliberations are made a matter of record. Wage Board may inquire and report to the Commission its findings as to the minimum wage adequate to supply to women and minors engaged in the occupation in question "the necessary cost of proper living and to maintain the health and welfare of such women and minors."

Commission has power after public hearing to determine minimum wage for women and minors in any occupation. Such hearing is on public notice in newspapers and by mailing copy to each county recorder not less than fourteen days before hearing. After such hearing Commission may make a mandatory order effective in sixty days, specifying minimum wage for women or minors in the occupation in question. No order

to become effective until after April 1, 1914. Order published and recorded in each county and mailed to each employer in question. Special licenses allowed.

Penalty for discharging employes or for disregarding order, not less than $50 and imprisonment not less than thirty days, or both. Employe may sue for difference. On appeal from order, the findings of fact made by Commission are, in absence of fraud, conclusive. Appeal within twenty days allowed to Superior Court of certain counties. Answer by Commission with return by Commission of all documents and papers and testimony and evidence. The court may confirm or set aside on grounds (1) that Commission acted in excess of its powers and (2) that its decision was procured by fraud. Either party may appeal from Superior Court to the Supreme Court.

ALSO IN CALIFORNIA (Chapter 98, Proposal Constitutional Amendments 1913). Proposes amendment to State Constitution authorizing legislature to establish minimum wage for women and minors.

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